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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 92-5164

WINSTAR CORPORATION, UNITED FEDERAL SAVINGS BANK, STATESMAN SAVINGS HOLDING CORP., THE STATESMAN GROUP, INC. AND AMERICAN LIFE AND CASUALTY INSURANCE COMPANY,

AND

GLENDALE FEDERAL BANK, FSB, PLAINTIFFS-APPELLEES

V.

THE UNITED STATES, DEFENDANT-APPELLANT

AUGUST 30, 1995

OPINION

BEFORE: ARCHER, *Chief Judge*,* and RICH, NIES, NEWMAN, MAYER, MICHEL, PLAGER, LOURIE, CLEVENGER, RADER, and SCHALL, *Circuit Judges*.**

Opinion for the court filed by Chief Judge ARCHER, in which Circuit Judges RICH, NEWMAN, MAYER,

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* Chief Judge Archer assumed the position of Chief Judge on March 18, 1994.

** Circuit Judge Bryson joined the Federal Circuit on October 7, 1994, and has not participated in the disposition of this appeal.

MICHEL, PLAGER, CLEVENGER, RADER, and SCHALL join. Dissenting opinions filed by Circuit Judges NIES, and LOURIE.

ARCHER, *Chief Judge.*

The United States appeals the decisions[1] of the United States Court of Federal Claims[2] granting plaintiffs Winstar Corporation and United Federal Savings Bank, No. 90-8C, plaintiffs Statesman Savings Holding Corporation, the Statesman Group Incorporated and American Life and Casualty Company, No. 90-773C, and plaintiff Glendale Federal Bank, No. 90-772C, summary judgment on the liability portion of their breach of contract claims against the United States. The cases were consolidated for purposes of this interlocutory appeal. We affirm.

I

In its *Winstar* decisions, the Court of Federal Claims found that an implied-in-fact contract existed between the government and Winstar and that the government breached this contract when Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No.

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[1] *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990) (finding an implied-in-fact contract but requesting further briefing on contract issues) (*Winstar I*); 25 Cl.Ct. 541 (1992) (finding contract breached and entering summary judgment on liability) (*Winstar II*); *Statesman Savings Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992) (granting summary judgment on liability to Statesman and Glendale).

[2] The Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, changed the name of the former United States Claims Court to the "United States Court of Federal Claims." Except where the context requires otherwise, we refer to the trial court by its new name.

101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464). Similarly, in the *Statesman* decision the Court of Federal Claims found that plaintiffs Statesman Savings Holding Corporation, the Statesman Group Incorporated and the American Life and Casualty Insurance Company (together "Statesman") and plaintiff Glendale Federal Bank ("Glendale") had express contracts with the government and citing its *Winstar* decision, found that these contracts were breached by the enactment of FIRREA.

The Court of Federal Claims certified its decisions in these three related cases for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) after determining that the decisions involved controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of these and other related cases. We granted the appeal. 979 F.2d 216 (Fed.Cir.1992). After an initial split panel decision of this Court reversed the Court of Federal Claims, 994 F.2d 797 (Fed.Cir.1993), we vacated the panel opinion and agreed with the plaintiffs' suggestion to consider these cases in banc.

II

A. During the Great Depression of the 1930s, 40 percent of the nation's $20 billion in home mortgages went into default, 1700 of the approximately 12,000 thrift institutions failed, and depositors in these thrifts lost $200 million. H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 292 (1989), *reprinted* in 1989 U.S.C.C.A.N. 86, 88-89 (House Report). Congress took several measures in response. First, Congress created the Federal Home Loan Bank Board (Bank Board) to channel funds to thrifts in order to prevent

foreclosures and to allow thrifts to make loans on residences. House Report at 292, 1989 U.S.C.C.A.N. at 88; see Federal Home Loan Bank Act, Pub.L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988)). Next, Congress added the Home Owners' Loan Act, which authorized the Bank Board to charter and regulate federal savings and loan associations. Pub.L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1988)). Then, to further restore public confidence in thrift institutions, Congress in the National Housing Act of 1934 provided federal deposit insurance for depositors. Pub.L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988)). This act also established the Federal Savings and Loan Insurance Corporation (FSLIC), an agency under the Bank Board's authority that regulated all federally insured thrifts.

Among the regulatory requirements promulgated and enforced by the agencies were capital requirements, which were minimum reserves of capital that a thrift had to maintain. Failure to comply with minimum regulatory capital requirements had severe repercussions for a thrift. The agencies had a variety of measures that could be taken against noncomplying thrifts. In the most serious cases, the government could seize the thrift and place it into receivership where it might later be sold or liquidated. This drastic remedy was rarely necessary, however, because of the relative health of the thrift industry until the thrift crisis of the late 1970s and early 1980s.

In the late 1970s and early 1980s high interest rates resulted in sharply higher costs of funds for thrifts.

The thrifts' main assets were long-term, fixed-rate mortgages taken during times of lower interest rates. As a result, the revenues produced by these mortgages were exceeded by the rapidly rising costs of attracting short-term deposits. Thrifts that were locked into long-term low interest rate loans simply could not meet their deposit obligations. This interest rate mismatch was one of the principal causes of numerous thrift failures. Eighty-one thrifts failed in 1981, 252 in 1982, and 102 in 1983. House Report at 296, 1989 U.S.C.C.A.N. at 92.

With all of these bank failures and the likelihood of more occurring, the FSLIC faced deposit insurance liabilities that threatened to exhaust its insurance fund. *See Olympic Fed. Sav. & Loan Ass'n v. Director, OTS*, 732 F.Supp. 1183, 1185 (D.D.C.1990). As an alternative to liquidating failing thrifts and expending the FSLIC's insurance funds, the Bank Board and FSLIC encouraged healthy thrifts to merge with the failing ones. In these supervisory mergers, the regulators provided direct assistance and other incentives necessary for the healthy thrifts to maintain their financial well-being after the mergers and in this way the regulators tried to avoid paying off the failing thrifts' deposits out of the FSLIC's insurance fund. Among the incentives offered by the FSLIC and the Bank Board was the use of the purchase method of accounting under which "supervisory goodwill" resulting from the merger would be treated as satisfying part of the merged thrift's regulatory capital requirements. *See* Bank Board Memorandum R-31b (1981). Another incentive was the use of "capital credits" that also could be counted toward the regulatory capital requirements.

The purchase method of accounting is a generally accepted accounting practice (GAAP) for mergers, which accounts for the surplus of the purchase price over the fair market value of the acquired organization as goodwill, an intangible asset. As explained by the Court of Federal Claims:

> Under [the purchase method of accounting,] . . . the book value of the acquired thrift's assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." . . . Goodwill was considered an intangible asset that could be amortized on a straightline basis over a number of years.

Winstar I, 21 Cl.Ct. at 113. In the context of a supervisory merger, the difference between the fair market value of the failing thrift's liabilities assumed by an acquirer and the fair market value of the failing thrift's assets was considered "supervisory goodwill." The Bank Board and the FSLIC allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to maintain capital compliance without having to put up large amounts of its own money and without requiring large amounts of monetary assistance from the government.

The capital credits incentive used by the Bank Board and the FSLIC to encourage mergers with failing thrifts involved the FSLIC's contribution of

cash to the merged thrifts. The regulators allowed a portion or all of this cash contribution to be treated as partial satisfaction of the merged thrift's regulatory capital requirements. In addition, this cash contribution in some instances would not be treated as an asset in determining supervisory goodwill generated by the merger.

Allowing acquirers of failing thrifts to treat supervisory goodwill and capital credits as regulatory capital stimulated many acquisitions that would otherwise not have taken place because of the difficulty of meeting the minimum capital requirements. Indeed this was the precise intention of the Bank Board and FSLIC—supervisory mergers could not have occurred without the approval by the regulatory agencies of these accounting treatments. As former Bank Board Chairman Richard Pratt stated in testimony before Congress:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. The GAAP approach to purchase method accounting mergers provided a bridge which allowed the Bank Board to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it.

Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before the House Comm. on

Banking, Finance and Urban Affairs, 101st Cong., 2d Sess., No. 176, at 227 (1990).

B. Winstar, Statesman and Glendale acquired insolvent, failing thrifts under this policy of encouraging thrift mergers. In each case, they received the government's approval and assistance. In each case, the government saved millions of dollars that it would have had to pay to the insured depositors if the failing thrifts had been liquidated instead of being acquired.

1. In September of 1981, Glendale Federal Bank was approached by First Federal Savings and Loan Association of Broward County (Broward) about a possible merger. Glendale was a federal savings and loan association based in California. It was a profitable thrift, which was in full regulatory compliance. Broward was a federal savings and loan association based in Florida that had incurred significant losses. Broward's liabilities exceeded its assets by approximately $734 million. Glendale submitted a merger proposal to the FSLIC. Glendale proposed to use the purchase method of accounting to record the supervisory goodwill resulting from this accounting as an intangible asset amortizable over periods up to 40 years. After lengthy negotiations over the terms and conditions, the FSLIC agreed to provide assistance to the merged entity and to recommend approval of the merger transaction to the Bank Board.

In its resolution approving the merger plan between Glendale and Broward, the Bank Board imposed the condition that Glendale provide an opinion letter satisfactory to the Board's supervisory agent from its independent accountants justifying the use of the purchase method of accounting, specifically describ-

ing any goodwill arising from the merger, and substantiating the reasonableness of the amounts attributable to goodwill and the resulting amortization periods and methods. The Bank Board resolution also gave the FSLIC authority to enter into a Supervisory Action Agreement (SAA) with Glendale. The SAA with Glendale was signed in November of 1981 and Glendale promptly consummated its merger with Broward. As required by the Bank Board resolution, Glendale later provided its accountants' justification and opinion letter satisfactory to the Bank Board, which stated that "$18,000,000 of the resultant goodwill . . . will be amortized on a straight line basis over 12 years" and that the "remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years." By the government's estimates, the Glendale-Broward merger saved the government approximately three quarters of a billion dollars.

2. In 1987 Statesman approached the FSLIC about acquiring a subsidiary of an insolvent state-chartered FSLIC insured savings and loan in Florida, First Federated Savings Bank (First Federated). The FSLIC responded to the inquiry by indicating that Statesman would have to acquire all of First Federated if the government was to assist. Further, it would require that Statesman's acquisition of First Federated be combined with the acquisition of three other financially troubled thrifts in Iowa.[3] After a year of negotiating the FSLIC and Statesman agreed

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[3] The three thrifts were First Federal Savings Bank of Waterloo, Iowa, Peoples Federal Savings and Loan Association of Waterloo, Iowa, and Perpetual Savings and Loan Association of Waterloo, Iowa.

on the terms of a complex plan whereby Statesman would acquire the four thrifts.

Like the merger of Glendale, Statesman's merger plan called for the use of the purchase method of accounting. The Statesman plan called for an investment by Statesman and its co-investor American Life and Casualty Company of $21 million into Statesman's Savings Holding Company, which in turn would purchase $21 million of stock in a newly-formed federal stock savings bank named Statesman Bank for Savings. The Statesman Bank for Savings would then merge with the four failing thrifts.

As part of the transactions, the FSLIC and Statesman entered into an Assistance Agreement calling for the FSLIC to provide a $60 million cash contribution to the Statesman Bank for Savings. Under the Assistance Agreement and the Bank Board Resolution approving the merger, $26 million of this cash contribution (including $5 million represented by a debenture that Statesman was required to pay back) was to be permanently credited to Statesman's regulatory capital (i.e., as a capital credit) for purposes of meeting minimum regulatory capital requirements. Statesman's merger is the only one of the three at issue in this appeal that involves a capital credit.

The Bank Board resolution permitted use of the purchase method of accounting. Supervisory goodwill arising from the merger acquisitions in the amount of $25.8 million was recognized as a capital asset for purposes of meeting regulatory capital requirements and Statesman was allowed to amortize that goodwill over 25 years. The Bank Board granted authority to the FSLIC to enter into the Assistance Agreement

with Statesman and required Statesman to provide an opinion letter from its independent accountants to justify its use of the purchase method of accounting and supervisory goodwill. Statesman provided the opinion letter to the agency's satisfaction. By the government's estimates, the cost of the Statesman merger to the government was $50 million less than the cost of liquidating the four thrifts.

3. In 1983 a Minnesota-based thrift, Windom Federal Savings and Loan Association (Windom), was in danger of failing. The board of directors of Windom determined that its failure could not be avoided without assistance from the FSLIC. The FSLIC estimated that liquidating the federally insured thrift could cost $12 million dollars and it pursued an alternative to paying this money out of its insurance fund. It chose to solicit bids for the acquisition of Windom.

Winstar Corporation was a holding company formed by investors for the purpose of acquiring Windom. Winstar in turn formed a new wholly-owned, federal stock savings bank, United Federal Savings Bank, to merge with Windom. Winstar's plan contemplated financing the merger by cash contributions by both the investors and the FSLIC. The plan also called for use of the purchase method of accounting and recording supervisory goodwill as an intangible asset which initially was to amortized over a period of 40 years (later changed to 35 years). After negotiating the terms with Winstar Corporation and its investors, the FSLIC recommended to the Bank Board that it approve the merger plan. The Bank Board approved the merger again subject to Winstar providing an opinion letter from its independent ac-

countants justifying the use of the purchase method of accounting and detailing the resulting supervisory goodwill. As a part of the transaction, FSLIC signed an Assistance Agreement with Winstar Corporation and the Bank Board issued a forbearance letter. The forbearance letter stated that intangible assets resulting from use of the purchase method of accounting "may be amortized . . . over a period not to exceed 35 years by the straight-line method." By the government's estimates, the Winstar-Windom merger saved the government $7 million over what liquidation of Windom would have cost.

C. In spite of these and similar actions taken by the Bank Board and the FSLIC, thrifts continued to fail and the public confidence in the thrift industry continued to erode during the late 1980s. In response to this crisis in the savings and loan industry, Congress in 1989 passed FIRREA. FIRREA substantially modified the overall thrift regulatory scheme. As pertinent here, it (1) abolished the FSLIC and transferred its functions to other agencies; (2) created a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation (FDIC); (3) eliminated the Bank Board and replaced it with the Office of Thrift Supervision (OTS), an office within the Department of Treasury, and made the OTS Director responsible for the regulation of all federally insured savings associations and the chartering of federal thrifts; and (4) established the Resolution Trust Corporation (RTC), which was charged with closing certain thrifts. *See* 12 U.S.C. §§ 1437 note, 1441a, 1821.

Among the legislative reforms of FIRREA was the requirement that the OTS "prescribe and maintain

uniformly applicable capital standards for savings associations." 12 U.S.C. § 1464(t)(1)(a). In addition, Congress expressly restricted the continued use of supervisory goodwill to satisfy regulatory capital requirements.

FIRREA required federally insured thrifts to satisfy three new minimum capital standards: "tangible" capital, "core" capital, and "risk-based" capital. 12 U.S.C. § 1464(t). Under FIRREA supervisory goodwill could not be included at all in satisfying minimum tangible capital. The amount of supervisory goodwill that could be included in satisfying "core" capital decreased each year after FIRREA's enactment and was entirely phased out on December 31, 1994. Finally, thrifts were required to maintain "risk-based" capital in an amount substantially comparable to that required by the Comptroller of the Currency for national banks. 12 U.S.C. § 1464(t)(2)(C). Although supervisory goodwill could be used for this purpose, FIRREA limited its amortization to a period of no more than 20 years. 12 U.S.C. § 1464(t)(9)(B).

FIRREA did not specifically cover capital credits or otherwise exclude FSLIC cash contributions from capital for purposes of determining compliance with any of the minimum capital requirements. The OTS, however, equated capital credits with "qualifying supervisory goodwill" within the meaning of the statute and promulgated a regulation that treated capital credits in the same manner as supervisory goodwill. 12 C.F.R. § 567.1(w).

As a result of FIRREA and the OTS regulation, many thrifts that were previously in full compliance with the regulations on capital requirements failed to

satisfy the new capital standards and immediately became subject to seizure. Glendale initially remained in compliance with the three new capital standards of FIRREA even though it was required to exclude all the unamortized supervisory goodwill that resulted from its merger with Broward for purposes of calculating its tangible capital and was required to accelerate the amortization of supervisory goodwill in calculating its required core and risk-based capital requirements. However, Glendale had to implement costly new measures to compensate for the exclusion of much of its supervisory goodwill from regulatory capital. Later, in March 1992, Glendale fell out of compliance with the risk-based capital standard.

After FIRREA, Statesman immediately fell below the three new capital standards established by the Act. As a result, the OTS appointed the RTC as receiver for Statesman in July of 1990. Winstar also fell into noncompliance as soon as the FIRREA capital requirements became effective. Winstar was placed in receivership by the OTS in May of 1990.

D. The plaintiffs filed suit in the Court of Federal Claims alleging that under FIRREA the preclusion or limited availability to them of supervisory goodwill (and capital credits in the case of Statesman) for satisfying regulatory capital constituted a breach of contract or, in the alternative, a taking of their contract rights without compensation in violation of the Fifth Amendment. The plaintiffs claimed that the government was contractually obligated to recognize supervisory goodwill generated by the mergers (and capital credits) as an intangible capital asset for purposes of their compliance with minimum regulatory capital standards. The plaintiffs also claimed

that they were entitled to amortize that supervisory goodwill for the agreed periods established at the time of their acquisitions of failing thrifts. Under their contract claims, plaintiffs asserted that FIRREA, and the regulations thereunder, as applied to them, breached those contract obligations. All of the plaintiffs filed summary judgment motions on the issue of liability.

The government defended on the grounds that there were no contractual rights as alleged and that in any event the alleged agreements were subject to statutory and regulatory changes. Relying principally on *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), the government argued that the thrifts impermissibly sought to enjoin Congress' power to legislate and the agencies' power to regulate. The government further argued that the sovereign acts doctrine, as stated in *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925), precluded recovery for any contractual rights breached by FIRREA.

The Court of Federal Claims granted summary judgment to the plaintiffs on the issue of liability under the contract claims and did not reach the constitutional takings claims. The court found that binding contracts were made between plaintiffs and the FSLIC in each of the three merger transactions. It held that these contracts were breached when the regulatory capital requirements of FIRREA, and the regulations, were applied to plaintiffs. The Court of Federal Claims distinguished *POSSE* on the grounds that the case did not involve bargained for contract rights but rather involved an entitlement program.

The court also distinguished *POSSE* because the relief sought was an injunction to prevent the government from acting in its sovereign capacity, whereas plaintiffs only claimed damages for breach of their contracts. Finally, the Court of Federal Claims found that FIRREA, in specifically limiting the use of supervisory goodwill that had previously been contractually authorized, was not a sovereign act but rather was aimed directly at thrifts with contracts like those of the plaintiffs. Thus, the court concluded that the government could not rely on the sovereign acts doctrine to shield it from liability.

III

We review the Court of Federal Claims' grant of summary judgment under a de novo standard of review, with justifiable factual inferences being drawn in favor of the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). On appeal both parties ask for entry of judgment in their favor based on the uncontested facts of record.

A. The Court of Federal Claims found that all the thrifts had contracts with the government that contained terms allowing the use of supervisory goodwill (and in Statesman's case, capital credits) to satisfy a portion of their regulatory capital requirements and that this intangible asset could be amortized over extended periods of time. In the Glendale and Statesman cases, the court determined there were express contracts with these terms, and in Winstar's case, that there was an implied-in-fact contract with these terms. The government initially contends that no such contractual terms existed.

Contract construction is a question of law that we review *de novo*. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957 (Fed.Cir. 1993). A principal objective in deciding what contractual language means is to discern the parties' intent at the time the contract was signed. *Arizona v. United States*, 575 F.2d 855, 863, 216 Ct.Cl. 221 (1978).

1. We agree with the Court of Federal Claims that the government had an express contractual obligation to permit Glendale to count the supervisory goodwill generated as a result of its merger with Broward as a capital asset for regulatory capital purposes. Similarly, as the trial court determined, under this agreement Glendale was entitled to amortize the major portion of that goodwill on a straight line basis for a period of 40 years, and the balance for 12 years.

The government contends that the FSLIC's SAA with Glendale is the only document evidencing Glendale's contract with the FSLIC and that it contains no promise relating to goodwill or its amortization. As noted by the Court of Federal Claims, however, Glendale's contract was not limited to the SAA itself, but also included the contemporaneous resolutions and letters issued by the FSLIC and the Bank Board. The SAA's integration clause provided:

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, *excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the [Bank Board] or the FSLIC*, provided, however,

> that in the event of any conflict, variance, or inconsistency between this Agreement and the Agreement of Merger, the provisions of this Agreement shall govern and be binding on all parties insofar as the rights, privileges, duties, obligations, and liabilities of the FSLIC are concerned.

(Emphasis added.)

One of these contemporaneous documents, which was relied on by the Court of Federal Claims, was Bank Board Resolution 81-710. The FSLIC needed the Bank Board's approval before it could enter into the SAA with Glendale and approve the merger. The FSLIC and Glendale had negotiated the terms of the Broward merger, including Glendale's proposed use of supervisory goodwill and Glendale's obligation to absorb Broward's deposit liabilities. After negotiating terms satisfactory to both parties, the FSLIC recommended to the Bank Board that it approve the merger and authorize the FSLIC to execute the SAA with Glendale.

Resolution 81-710 provided the Bank Board's approval, with certain conditions that Glendale was required to satisfy to the Bank Board's satisfaction, including the following:

> Not later than sixty days following the effective date of the merger, Glendale shall furnish an opinion from its independent accountant, satisfactory to the Supervisory Agent, which (a) indicates the justification under generally accepted accounting principles for the use of the purchase method of accounting for its merger with Broward, (b) specifically describes, as of the Effective Date, any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods . . . .

The Resolution continued:

> Glendale shall submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with [Bank Board] Memorandum R-31b . . . .

Memorandum R-31b (1981) was the Bank Board's "guidelines" on how an acquiring thrift could count the excess of the acquired thrift's purchase price over the acquired thrift's fair market value as an intangible asset under the purchase method of accounting.[4]

Thus, in Resolution 81-710, the Bank Board clearly evidenced its approval of the terms of the merger, including the terms that the purchase method of accounting would be employed in accounting for the

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[4] The Memorandum provided that:

> An application from an association requesting approval for a business combination to be accounted for by the purchase method of accounting, from which intangible assets will result, should include a description of any resulting intangible assets and the plan for their amortization. This description should discuss the nature and results of management's analysis of the underlying intangible assets and the resulting amortization periods and methods.

In accordance with applicable accounting principles, the Memorandum limited the period of amortization to 40 years or less.

merger, that goodwill arising from the merger would be recorded on Glendale's books, and that such goodwill would be amortized for reasonable periods under reasonable methods, provided these accounting treatments were justified to the satisfaction of the Bank Board's supervisory agent. In this connection, the Court of Federal Claims observed:

> It is also uncontroverted that the government manifested its approval of the terms set forth in the opinion letter prior to the effective date of the Supervisory Action Agreement. In a letter from H. Brent Beesley, then-Director of FSLIC, to [Bank Board] dated November 19, 1981, FSLIC recommended the use of the purchase method of accounting for the merger. Beesley explicitly referred to a Peat, Marwick, Mitchell & Co. opinion letter dated November 10, 1981 setting forth the specific amount of supervisory goodwill projected to be amortized pursuant to the merger, assuming the use of the purchase method of accounting.

26 Cl.Ct. at 910.

After the merger, Glendale submitted the required letter from its independent accountants to the Bank Board's supervisory agent. The letter confirmed as of the date of closing the amount of goodwill resulting from the merger under the purchase method of accounting and reiterated the amortization periods and the amounts of goodwill to be amortized under each period.

> Pursuant to the provisions of the Agreement of Merger between [Glendale] and Broward dated November 20, 1981 and the Supervisory Action Agreement between [Glendale] and the Federal Savings and Loan Insurance Corporation (FSLIC) dated November 20, 1981, upon the effective date of November 20, 1981, [Glendale] accounted for the acquisition using the "Purchase Method" of accounting . . . .
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> . . . .
>
> . . . $18,000,000 of the resultant goodwill is associated with the savings deposit base and will be amortized on a straight line basis over 12 years, the estimated life of the savings deposit base. The remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years as [Glendale] believes that the remaining goodwill has an indefinite life since it is related to expansion of operations into an entirely new market area.

The letter further opined that the accounting and methodology for calculating supervisory goodwill were in accordance with generally accepted accounting principles. Glendale satisfied the conditions for merger approval set out in Resolution 81-710 by submitting both the independent accountants' opinion and the stipulation that the accounting was in accordance with Memorandum R-31b. Moreover, there is no dispute that these submissions were satisfactory to the Bank Board's supervisory agent as required by that Resolution.

We conclude based on all of the contemporaneous documents, which under the integration clause of the SAA collectively constituted the "Agreement" of the parties, that the Bank Board and the FSLIC were contractually bound to recognize the supervisory

goodwill and the amortization periods reflected in the approved accountants' letter. It is clear from the documents that this was the intent of the parties. Glendale consummated its merger with Broward on this understanding and in doing so saved the government hundreds of millions of dollars.

Our conclusion is supported by other evidence and by the circumstances surrounding the transaction. If the parties did not intend to use supervisory goodwill for regulatory capital purposes there would simply be no reason for the extensive negotiations and the conditions regarding its use. It is not disputed that if supervisory goodwill had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation.[5] Moreover, the recitals of the SAA state that "Glendale proposes to enter into an agreement of merger with [Broward]" and that Broward "is in danger of default and that the nature and/or amount of such assistance would be less than the losses FSLIC would sustain upon the liquidation of [Broward]." Without the use of supervisory goodwill, the merged thrifts would have been in a failing position resulting in the losses the FSLIC sought to avoid. Finally, it is appropriate to observe that no healthy thrift would consummate a transaction that immediately put it in regulatory noncompliance.

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[5] Prior to the merger, Glendale was a healthy, fully capitalized thrift. Glendale asserts, and the government does not disagree, that after merging with Broward Glendale's regulatory net worth would have been negative $460 million if supervisory goodwill had not been counted as a capital asset.

We consider the government's argument that the Bank Board Resolution was merely a statement of "then-current prosecutorial and regulatory policy" to be of little significance. Once specific terms as to the amount of supervisory goodwill and its amortization periods under that regulatory policy were incorporated in a negotiated arm's length contract, both parties were bound to them. While it is true as the government argues that a statement of policy, for instance as set forth in Memorandum R-31b, could be changed (which it later was), the contract could not be changed except by mutual consent.

The government makes two additional arguments why the Court of Federal Claims' interpretation was wrong. First it contends that the SAA expired by its terms in November 1991, prior to the alleged breach. We view the expiration provision as only relating to executory provisions set out in the SAA, which obligated the FSLIC to make certain payments to the merged thrift for a limited period of time. This provision of the SAA in any event does not negate other obligations under the merger plan, including the specific time periods for amortization of goodwill.

The government's second argument is based on the clause contained in the SAA, which provides that: "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." The government contends this clause contemplates possible future changes in the law. The proper reading of this clause, however, is that neither party is required to act to the extent that some portion of the contract inadvertently violated the law as it existed at the time the contract was entered into. In any case, the clause clearly is not an escape hatch

that allows the federal government to avoid performance of its contractual obligations without penalty by passing a law prohibiting its own performance.

2. The Statesman transaction involved the acquisition by merger of four failing thrifts, and thus the accompanying documentation was more complex than that in the Glendale transaction. The Court of Federal Claims determined an express contract existed between the plaintiffs and the government which permitted the use of supervisory goodwill and capital credits in meeting regulatory capital levels, and which established the amortization period for such goodwill. We agree.

In connection with the acquisition of the four thrifts, Statesman signed an Assistance Agreement with the FSLIC. The Assistance Agreement contained express terms that allowed capital credits to be used to satisfy regulatory capital. Not surprisingly, the Court of Federal Claims stated that "the government readily concedes that an express contract existed, at least in regard to the $26 million capital credit extended by the government to Statesman." 26 Cl.Ct. at 912. A similar concession has been made by the government in its appeal brief, which states:

> The terms of the Assistance Agreement provided that $26 million of that amount (the "capital credit") constituted RAP goodwill to be credited to Statesman's regulatory capital.

Thus, although the government maintains these terms were not insulated against changes in the law, there can be no doubt that contractual promises regarding capital credits were made.

The Statesman documents regarding the treatment of supervisory goodwill are, in substance, the same as those in the Glendale transaction. The Assistance Agreement contained an integration clause that incorporated contemporaneous resolutions of the Bank Board. The Bank Board's Resolution 88-169 approved the Statesman merger plan and authorized the FSLIC to enter into the Assistance Agreement. In contrast to the Glendale resolution, however, Resolution No. 88-169 expressly approved and described the accounting treatments to be used in the Statesman merger transaction, as follows:

> [T]he Acquisition and the Mergers shall be accounted for, and [Statesman] shall report to the Bank Board and the FSLIC, in accordance with generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified, or interpreted by applicable regulations of the Bank Board and the FSLIC, except to the extent of the following departures from generally accepted accounting principles:
>
> (a) Twenty-one million dollars of the initial contribution by the [FSLIC] to [Statesman], and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC, pursuant to § 6 of the Assistance Agreement, shall be credited to the regulatory capital account of [Statesman]; and
>
> (b) The value of any unidentifiable intangible assets resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amor-

> tized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method.
> . . .

As stated in the government's appeal brief:

> The Bank Board resolution also permitted use of the purchase method of accounting for the acquisitions. Thus, Statesman was allowed to amortize $25.8 million more in supervisory goodwill for 25 years.

As it did in the Glendale transaction, the Bank Board reserved its approval of this accounting treatment until Statesman furnished within ninety days, "an analysis accompanied by a concurring opinion from its independent certified public accountants" which

> shall (a) specifically describe, as of the Effective Date, any intangible assets, including goodwill and the discount and premiums arising from the Acquisition and the Mergers, to be recorded on New Federal's books, and (b) substantiate the reasonableness and conformity with regulatory requirements of the amounts attributed to intangible assets, including goodwill and the discount and premiums, and the related amortization periods and methods . . . .

The government concedes that this condition was met to the Board's satisfaction.

We conclude that the government was contractually obligated to recognize the capital credits and the supervisory goodwill generated by the merger as part of the Statesman's regulatory capital requirement and to permit such goodwill to be amortized on a straight line basis over 25 years.

3. The Court of Federal Claims concluded that Winstar had an implied-in-fact contract that obligated the government to allow Winstar to treat supervisory goodwill as a capital asset for regulatory capital purposes to be amortized over a 35 year period. Because we are satisfied that an express agreement existed between the FSLIC and Winstar, on the same terms found by the Court of Federal Claims, we do not reach the question of whether there could also be an implied-in-fact contract.

In July 1984 Winstar entered into an Assistance Agreement with the FSLIC. The Assistance Agreement stated that "the purpose of this Agreement [is] to provide a means by which the failure of [Windom] may be prevented, the savers and other creditors of [Windom] may be protected against losses . . . , [United] and Winstar may receive the benefits and assume the risks contracted for, and expenses to [the FSLIC] may be reduced." While this purpose recognized there was a mutual exchange of benefits and risks in the agreement, Winstar's Assistance Agreement, like Glendale's SAA, did not directly cover the treatment of supervisory goodwill. Again, however, this Assistance Agreement contained an integration clause which made "the Merger Agreement and any resolutions or letters issued contemporaneously with [the Assistance Agreement]" part of the contract between the parties.

Among the documents evidencing the government's contractual obligation is a forbearance letter of the Bank Board issued in July of 1984 to the Winstar investors. The forbearance letter in the first paragraph states the purpose is to "confirm the understanding that," after which it proceeds to enumerate

several terms of the Winstar transaction. Paragraph 2 of those terms provides:

> For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by [Winstar] over a period not to exceed 35 years by the straight-line method . . . .

The other documentation in the Winstar transaction is substantially identical to that in the Glendale transaction with respect to accounting treatment for the merger. For example, there is a contemporaneous Bank Board resolution, Resolution 84-363, approving the Winstar merger and giving the FSLIC the authority to proceed. That resolution required Winstar to provide an opinion "from its independent public accountants, satisfactory to the Supervisory Agent and to the Office of Examinations and Supervision" describing the use of goodwill and substantiating its reasonableness and conformity with regulatory requirements. It is not contested that Winstar satisfied the conditions in Resolution 84-363 to the Bank Board's satisfaction.

We conclude that the documentation in the Winstar transaction establishes an express agreement allowing Winstar to proceed with the merger plan approved by the Bank Board, including the recording of supervisory goodwill as a capital asset for regulatory capital purposes to be amortized over 35 years. Other circumstances, such as those discussed above in connection with the Glendale transaction, are consistent with this conclusion and demonstrate that it was the intention of the parties to be bound by the accounting treatment for goodwill arising in the

merger. Likewise, we find the government's arguments regarding the expiration of the Assistance Agreement and the Agreement's "unlawful action" provision unpersuasive for the same reasons as in the Glendale transaction.

Finally, the government argues the Net Worth Maintenance Stipulation signed by Winstar required Winstar to abide by any changes in the law regarding regulatory capital. We agree to the extent the Stipulation requires Winstar to maintain its capital at levels set by the bank regulators. Winstar, like other thrifts, was bound to keep in compliance with banking regulations and laws regarding capital levels except to the extent the Bank Board expressly agreed to forbear from enforcing its regulations against it. This stipulation by Winstar to maintain its regulatory net worth at whatever level the regulators set does not, however, eclipse the government's own promise that Winstar could count supervisory goodwill in meeting the regulatory requirements with which it had promised to comply.

B. There can be little question that the application of FIRREA and the regulations thereunder to deny or restrict plaintiffs' contractual rights to use supervisory goodwill with the associated amortization periods, and for Statesman's capital credits, in partial satisfaction of their capital requirements was a breach of the FSLIC's and the Bank Board's agreements with them. FIRREA greatly reduced the amount of supervisory goodwill that could be used to meet regulatory capital requirements. *See* 12 U.S.C. § 1464(t). The OTS by regulation treated capital credits in the same manner as supervisory goodwill,

see 12 C.F.R. § 567.1(w), thereby restricting the use of such credits for regulatory capital purposes.[6]

Failure to perform a contractual duty when it is due is a breach of the contract. *Restatement (Second) of Contracts* § 235(2) (1981). The three plaintiff thrifts negotiated contracts with the bank regulatory agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time. When the plaintiffs satisfied the conditions imposed on them by the contracts, the government's contractual obligations became effective and required it to recognize and accept the purchase method of accounting for the mergers and the use of supervisory goodwill and capital credits as capital assets for regulatory capital requirements.

After FIRREA and its implementing regulations, the bank regulatory agencies limited these assets as acceptable regulatory capital and limited the amortization periods. As a result, Winstar and Statesman were immediately thrown into noncompliance with the new regulatory capital requirements and were seized by federal regulators within approximately six months. Glendale survived the new capital standards but at considerable detriment. We conclude the government failed to perform its contractual obligations under plaintiffs' contracts.

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[6] Because we affirm the Court of Federal Claims' decision in this case, we need not reach the question of whether FIRREA contemplated that capital credits would be treated as a form of supervisory goodwill.

C. The government makes two additional arguments why the thrifts' claims must fail. It contends (1) that the contracts failed to secure unmistakably the government's contractual obligations in the face of legislative change (the "unmistakability doctrine") and (2) that the government's contractual obligations were relieved by the enactment of "public and general" legislation by the Congress (the "sovereign acts doctrine"). The Court of Federal Claims analyzed each of these arguments extensively in its opinions and found neither to be persuasive. We agree with, and adopt, the substance of these analyses. *See Winstar I*, 21 Cl.Ct. at 115-17; *Winstar II*, 25 Cl.Ct. at 544-53; *Statesman*, 26 Cl.Ct. at 916-24.

1. The government contends that interpreting the contracts at issue as guaranteeing certain accounting treatments in spite of Congress' enactment of FIRREA is a restriction on the government's power to legislate. The Supreme Court's decision in *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2397 is cited for the proposition that in interpreting contracts to which the government is a party, the contract should not be construed as waiving the government's power to legislate unless it says so in unmistakable terms. In *POSSE* the Court, quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982), stated:

> [W]e have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Therefore, contractual arrangements, including those to which a sovereign

> itself is party, "remain subject to subsequent legislation" by the sovereign.

POSSE, 477 U.S. at 52, 106 S.Ct. at 2397 (citations omitted). In its briefs on appeal and in the proceedings below, the government also relied heavily on the opinion of the District of Columbia Circuit in *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir.1992). (As explained below, Transohio was modified by the District of Columbia Circuit after the in banc arguments in the instant cases.) Because none of the thrifts can point to express language in their contracts preserving their contractual rights in the face of legislative change, the government concludes that the contracts must yield to the later enacted FIRREA capital requirements.

The Court of Federal Claims in its first *Winstar* opinion, 21 Cl.Ct. at 115, viewed *POSSE* as being inapposite because the government "mischaracterize[s] the plaintiffs' claim as one which improperly seeks to bind the government's power to regulate." Rather, the court noted that plaintiffs sought only money damages, which did not implicate the government's power to regulate. Thereafter, in its *Winstar II* opinion considering the government's motion for clarification, the Court of Federal Claims held that *POSSE* did not preclude finding a binding contract that had been breached by the government, explaining its holding as follows:

> Contrary to the assertions of the government, the Court's holding in *POSSE* in no way precludes this court from finding the existence of a contract between the government and plaintiffs. As is evident from its opinion, the Court in *POSSE*

> recognized that the government has the power to enter into contracts which confer vested rights—rights which the government has a duty to honor. See *Perry v. United States*, 294 U.S. 330, 351 [55 S.Ct. 432, 435, 79 L.Ed. 912] (1935) ("To say that the Congress may withdraw or ignore [its] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."); *Lynch v. United States*, 292 U.S. 571, 580 [54 S.Ct. 840, 844, 78 L.Ed. 1434] (1934) ("Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").
>
> In *POSSE*, however, unlike the case here, no such vested rights were created as the basic elements of contract formation were absent. In contracts involving the government, as with all contractual relationships, rights vest and contract terms become binding when, after arms length negotiation, all parties to the contract agree to exchange real obligations for real benefits. In *POSSE*, the Court determined that such vested contract rights did not exist. *POSSE*, 477 U.S. at 52, 54-55 [106 S.Ct. at 2396-97, 2397-98]. Although the Court did not explicitly so state, the facts of *POSSE* make it clear that the provisions of the original Social Security Act were not promulgated

> after negotiation, arms length or otherwise, between Congress and the plaintiffs who filed suit. As is the case with all legislation, the only "negotiations" or bargaining involved in the enactment of the original Social Security Act and its amendments took place in the halls of Congress. The "rights" at issue in *POSSE*, then, were solely government-created. They were really policy decisions made by the democratic political process. There was no legal consideration for the creation of these "rights." At any time, the government could revoke them *without legal consequence* because the plaintiffs had not bargained for their creation.

25 Cl.Ct. at 545-46 (footnotes omitted) (emphasis in original).

The Court of Federal Claims returned to the government's unmistakability argument again in its opinion in the Statesman case. By this time the District of Columbia Circuit had issued its opinion in *Transohio*, which the government argued supported the unmistakability argument it had made in *Winstar*.

In *Transohio*, the plaintiff was a healthy thrift that merged with a failing one upon signing an Assistance Agreement with the FSLIC. After FIRREA was enacted, Transohio sought a preliminary injunction to enjoin the government from applying FIRREA's provisions against the use of supervisory goodwill as regulatory capital. It argued that FIRREA would breach the government's Assistance Agreement and that there would be a taking of Transohio's property under the Fifth Amendment.

The D.C. Circuit affirmed the district court's denial of the injunction because Transohio was unlikely to succeed on the merits. *Transohio*, 967 F.2d at 601. While noting the district court had no jurisdiction over the breach of contract claims, the D.C. Circuit analyzed whether Transohio had any contractual property rights that were protected under the due process clause of the Fifth Amendment. *Id.* at 617. The court agreed there was a contract right for the treatment of goodwill, *id.* at 618 ("We think the documents strongly suggest that, in addition to money, the agencies gave Transohio some ability to count as regulatory capital the intangible assets created by its mergers."), but concluded that the unmistakability doctrine precluded an interpretation of the contract that would guarantee such treatment against legislative change. *Id.* at 620. Because the thrift's contract and taking claims were both dependent on the existence of a binding contract, the court stated there was no need to remand the case to consider the thrift's monetary claims in the Court of Federal Claims. *Id.* at 614.

The government argued to the Court of Federal Claims that *Transohio* was persuasive precedent against interpreting the thrift agreements as allowing recovery for contractual breach in the face of legislative change. The Court of Federal Claims was unpersuaded and criticized the *Transohio* court's use of the unmistakability doctrine as one of contract interpretation rather than one of contract creation.

> The purpose animating the unmistakability doctrine makes it clear that the doctrine controls how contractual rights with the government are *created*, *i.e.*, whether the government has agreed

in unmistakable terms to be contractually bound. The doctrine never has been understood as controlling, as the government has alleged in the *Winstar*-related cases, the effect of the government's breach of a contract. *See United States Trust Co. v. New Jersey*, [431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977)] ("Th[e] [unmistakability] doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment."). The doctrine solely goes to whether a party possesses contractual rights which are binding and for which damages may be given.

Thus, in *Winstar* and the instant cases, there has been little serious dispute that the government granted the acquiring thrifts, in the clearest possible terms, the right to certain types of regulatory capital treatment. Likewise, the acquiring thrifts have never contended in this court that the government is bound to specifically perform on this obligation. Rather, the dispute has primarily raged over the question of breach. Namely, whether the government must pay damages or provide restitution for its breach, or whether it is excused from such damages by an interpretation of *POSSE* or the sovereign acts doctrine. The historical understanding of the unmistakability doctrine is not applicable to this issue.

26 Cl.Ct. at 920.

We agree with the Court of Federal Claims' view on the unmistakability doctrine. The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change. Further, we conclude the Court of Federal Claims properly rejected the government's argument based on *POSSE* that its sovereign power to legislate is at issue here. As the Court of Federal Claims observed:

> It is critical to this case . . . that plaintiffs are not claiming that the government contractually bound Congress not to change its regulations. Rather, plaintiffs claim that in their particular transaction with the government, it was agreed that they would be permitted to treat supervisory goodwill in a particular way for a fixed number of years. Thus, while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit.

Winstar I, 21 Cl.Ct. at 116.

The thrifts did not ask for, and the Court of Federal Claims could not provide, injunctive relief that would have enjoined the thrift regulators from applying the FIRREA requirements to the thrifts. *See Kanemoto v. United States Dep't of Justice*, 41 F.3d 641, 644 (Fed. Cir. 1994). Rather the thrifts sought money damages for breach of contract by the government. Money damages, in contrast to injunctive relief, presents little threat to the government's sovereign powers, other than the obvious financial incentive to honor its contracts. The Supreme Court's decision in

POSSE is predicated on the need to protect the sovereign's legislative power and that concern is inapplicable where money damages alone are at issue. *Hughes Communications*, 998 F.2d at 958 (distinguishing *POSSE* and other unmistakability cases as cases seeking to enjoin the sovereign power to legislate from cases in the Court of Federal Claims where the plaintiff seeks only money damages). In sum, Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the government's prior contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach.

Significantly, after the *Winstar* and *Statesman* cases were argued to this court sitting in banc, the D.C. Circuit in a later proceeding in the *Transohio* case reconsidered its earlier position. *See Transcapital Fin. Corp. v. Director, Office of Thrift Supervision*, 44 F.3d 1023 (D.C. Cir. 1995). The court recognized that its prior decision concerned only the denial of injunctive relief, and stated that its "analysis has no bearing one way or the other on the merits of [Transohio's] claim for *compensation* in the Federal Court of Claims [sic]." At 1026 (emphasis in the original). Thus the *Transohio* decision, as modified, complements our decision. In *Transohio*, the thrift sought to enjoin the government on the basis of its contractual rights and the court ruled it could not do so. In the present case, the thrifts seek only money damages with no request to enjoin the government. Accordingly, the sovereign's power to legislate is not here at issue, only money damages

because the FIRREA legislation has breached the contracts.

We are also persuaded, as the Court of Federal Claims held, that the Bank Board and the FSLIC, as the principal regulators of the thrift industry, were fully empowered to enter into the contracts at issue here. Since its inception, the FSLIC has had the power "[t]o make contracts." 12 U.S.C. § 1725(c)(3) (repealed). The FSLIC and its supervisory agency, the Bank Board, have had the authority both to extend assistance to acquirers of insolvent FSLIC-insured thrifts, 12 U.S.C. § 1729(f)(2)(A) (repealed), and to set minimum capital limits on a case-by-case basis, 12 U.S.C. § 1730(t)(2) (repealed). Although the FSLIC's authority to provide assistance could not exceed the cost of liquidating the thrift, in each of the transactions on appeal the government was saving millions of dollars over the cost of liquidation.

2. Finally, the government argues that FIRREA was a public and general sovereign act and that the government's contractual performance is excused when it is precluded by such an act. Citing the leading case on the sovereign acts doctrine, *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925), the government contends that FIRREA was a public and general act that excused its contractual performance. We agree, however, with the Court of Federal Claims that the relevant sections of FIRREA are not public and general sovereign acts. Therefore, the sovereign acts doctrine does not apply.

"[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its

public and general acts as a sovereign." *Horowitz*, 267 U.S. at 461 (citations omitted). The sovereign acts doctrine is a part of every contract with the government, whether the contract explicitly provides for it or not. *Hughes Communications*, 998 F.2d at 958. *Horowitz* makes clear that the sovereign acts doctrine is intended to level the playing field between the government and its contractors. "In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants." *Horowitz*, 267 U.S. at 461, 45 S.Ct. at 345 (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384, 1865 WL 1976 (1865)).

Not every governmental action, however, qualifies as a sovereign act within the meaning of the doctrine. Only those "public and general acts as a sovereign" qualify. While presumably all government action is enacted for the good of the public, government action whose principal effect is to abrogate specific contractual rights does not immunize the government from contractual liability under the doctrine. *Everett Plywood Corp. v. United States*, 651 F.2d 723, 731-32 (Ct.Cl. 1981); *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct.Cl. 1978). As noted by the Court of Federal Claims in its *Winstar II* decision:

> [W]here the government abrogates through a limited and focused action specific government obligations to a particular class of individuals or entities it has contracted with, the government is not afforded immunity. In these instances, the government acts not in its capacity as sovereign, but in its capacity as contractor.

25 Cl.Ct. at 551 (citations omitted).

The Court of Federal Claims determined with respect to the Winstar transaction:

> The pertinent sections of FIRREA at issue here, 12 U.S.C. § § 1464(t)(3)(A) and (9)(B), preclude the application of the sovereign acts doctrine. Their very purpose was to take away plaintiffs' rights to use supervisory goodwill because the Congress felt its use was no longer good policy. Courts assessing sovereign act claims have not granted immunity where the sole purpose of the government action is to reverse an earlier policy decision later deemed unwise.

Id. at 552 (citations and footnotes omitted). The government argues the Court of Federal Claims erred in concluding that the pertinent FIRREA sections were directed only at thrifts with agreements with the FSLIC. In its brief, the government contends "[t]he FIRREA goodwill restrictions apply to *all* thrifts, whether they previously had goodwill created or may undertake transactions that create goodwill in the future, and whether or not they had contracts assertedly freezing the prior regulatory treatment of goodwill." (Emphasis in original.)

The relevant provisions of FIRREA are 12 U.S.C. §§ 1464(t)(3)(A) and 1464(t)(9)(A)-(C). Section 1464(t)-(9)(A) defines "core capital" as that "defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets. . . ." Goodwill is one form of an "unidentifiable intangible asset." An exception to the rule against intangible assets

being includable in core capital is set forth in the transition rule at § 1464(t)(3)(A). That section provides "[n]otwithstanding paragraph 9(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital." 12 U.S.C. § 1464(t)(3)(A). The section then provides a table that limits the amount of qualifying supervisory goodwill until it is totally phased out in 1995. Section 1464(t)(9)(C) provides the definition of "tangible" capital, which excludes all intangible assets, including supervisory goodwill. Section 1464(t)(9)(B) defines "qualifying supervisory goodwill" as supervisory goodwill existing on April 12, 1989 and limits the amortization period of qualifying supervisory goodwill to the shorter of 20 years or the remaining amortization period in effect on April 12, 1989.

The statute plainly singles out supervisory goodwill for special treatment, albeit treatment less harsh than other forms of intangible assets. Supervisory goodwill only results from a supervisory merger, a merger that necessarily required the participation of the FSLIC.[7] Thus, thrifts that underwent a supervisory merger, like appellants, are singled out for special treatment by the statute. The statute specifically limits their ability to include certain

[7] *See* House Report at 432, 1989 U.S.C.C.A.N. at 228:

> [T]he Committee intends the term "supervisory goodwill" to mean goodwill resulting from the acquisition, merger, consolidation, purchase of assets or other business combination of any savings association where the market value of the assets acquired was less than the market value of the liabilities at the time of the transaction and where the accounting treatment of the goodwill has been approved by the Federal Home Loan Bank Board.

assets in their calculation of capital. Although there is no doubt Congress passed this legislation out of concern about the use of "accounting gimmicks" behind the insured deposits, the legislation quite specifically abrogates agreements the government had made at an earlier time when it had suggested and approved the use of such "gimmicks" to avoid bailing out failing thrifts.

The legislative history behind FIRREA demonstrates that those debating the bill in Congress knew that some thrifts claimed to have contractual rights regarding the use of supervisory goodwill and that the subject provisions would breach those contracts. Three members of the House Committee on Banking, Finance and Foreign Affairs stated in response to the House version of FIRREA:

> Unfortunately, [FIRREA] was amended by the Full Committee to phase out the treatment of goodwill for capital purposes over a five year period. Simply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill.
>
> . . . Clearly, the agreements concerning the treatment of goodwill were part of what the institutions had bargained for. Just as clearly, the Committee is abrogating those agreements.

House Report at 498, 1989 U.S.C.C.A.N. at 293-94 (additional views of Reps. Annunzio, Kanjorski, and Flake). Representative Ackerman argued that "[FIRREA] would abrogate written agreements made by the U.S. Government to thrifts that acquired failing institutions by . . . no longer counting goodwill as capital after a 4-year transition period. In effect,

the Government is saying 'thanks for your help, but we don't need you anymore, so we're breaking our promise.'" 135 Cong.Rec. H2783 (daily ed. June 15, 1989). These remarks, which are by no means exhaustive, illustrate that many in Congress were concerned about FIRREA's repudiation of the supervisory goodwill promises made in the thrift agreements.

One of the dissents argues that because the pertinent sections were part of a "comprehensive piece of national legislation" enacted by Congress, the sections are general and public acts that excuse the government's contractual performance. We disagree. First, the portions of FIRREA at issue in this case are not any less directed at thrifts that had supervisory mergers because they are part of "comprehensive" legislation. By definition, the pertinent sections apply only to supervisory goodwill, which could only occur as a result of a supervisory merger, that was in existence on April 12, 1989. The legislation plainly singles out thrifts that underwent supervisory mergers for special treatment.

Second, we do not find the dissent's attempt to distinguish *Sun Oil* and *Everett Plywood* as cases limited to agency action persuasive. There is no reason to distinguish action by the legislative branch from that of the executive branch. Indeed, the agencies in the executive branch receive their power to enter into the contracts from the legislative branch. The contracts the agencies properly enter into are not binding only at the grace of the legislative branch. Thus the *Horowitz* case makes no distinction between the acts of the coordinate

branches of government. *See* 267 U.S. at 461 ("be they legislative or executive").

Finally, we know of no authority for this dissent's position that the government has a sovereign right to disavow its contractual obligations through comprehensive national legislation. Such a proposition is not supported by *Horowitz* and cannot be reconciled with the decisions of the Supreme Court in *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed.912 (1935). These decisions belie the notion that the government may repudiate its contracts by merely claiming it is acting in its "sovereign" capacity.

We accept, as did the Court of Federal Claims, that FIRREA was enacted for the public welfare—presumably all legislation is. We are convinced, however, that the FIRREA provisions at issue here targeted thrifts that had undergone supervisory mergers, financed in part with supervisory goodwill, with the approval and assistance of the federal government. Moreover, the undisputed reason for limiting the use of the supervisory goodwill was precisely the reason the government used it in the first place—it is a money equivalent, not money. The government has plainly sought to render its own performance impossible. This is not a public and general act. The sovereign acts doctrine does not apply.

CONCLUSION

There is nothing extraordinary about the contracts in these cases save for their subject matter and the potential liability to the government. It is well established that the government may enter into contracts with private individuals as parties. *See*

Perry v. United States, 294 U.S. 330, 353, 55 S.Ct. 432, 436, 79 L.Ed. 912 (1935) ("[T]he right to make binding obligations is a competence attaching to sovereignty.") (footnote omitted). Our decision is consistent with long standing precedent that when the government enters into such contracts, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (footnote omitted); *see also Perry*, 294 U.S. at 352, 55 S.Ct. at 435 ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.").

We conclude the thrifts' contracts are enforceable against the government and that the government bargained to allow the thrifts to count certain intangible assets created in their mergers as capital assets for specified periods of time. The government later exercised its sovereign prerogative to enact legislation to limit the use of these intangible assets towards meeting capital requirements. Although the government was free to legislate, it remains liable for breach of contract where its legislation is directed at repudiating its prior contractual agreements. We conclude FIRREA repudiated the government's agreements with the plaintiff thrifts. Accordingly, we affirm the liability judgments of the Court of Federal Claims.

AFFIRMED.

NIES, *Circuit Judge*, dissenting.

Following *in banc* rehearing, additional briefing, and Chief Judge Archer's thoughtful opinion, I have reviewed my position in this appeal which is set out at 994 F.2d 797-813. However, I cannot agree that Congress "breached" contracts between the plaintiffs and the "government," that is, the Bank Board and FSLIC, by enacting FIRREA. The majority's holding impermissibly fuses "the two characters which the government possesses as a contractor and as a sovereign." *Horowitz* v. *United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925). In my view, the plaintiffs can assert only a claim for an alleged taking of their property by the legislation, a claim which remains to be litigated. This is not a mere technicality. The amount of damages for a "taking" by legislation and for breach of contract are significantly different.

Further, I disagree that a breach of contract occurred even accepting that the Bank Board and the FSLIC were contractually bound to recognize supervisory goodwill* and particular amortization periods. While the regulators agreed to allow the thrifts to use their proposed accounting methods, that is as far as any contract with the "government" went. In the case of private parties, the burden of a change in the law is borne by the party on which it falls, unless

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* The "purchase method of accounting," in some circumstances, may be "generally accepted accounting practice," but the thrifts could not use that practice to create nonexistent capital as a basis on which they could make loans. The bank regulators had to approve the practice for the thrifts to be able to use this practice for such purposes.

responsibility is otherwise assigned in the contract. Contracting parties in that situation "gain nothing by having the United States as their defendants." *Id.* As delineated in my prior opinion, no clause can be found in the contracts under which the Bank Board and the FSLIC promised to pay if Congress decided to step in and do away with the "purchase method of accounting," a euphemism for spinning straw into gold, and other accounting gimmicks. In this highly regulated industry, the thrifts did not negotiate contracts that freed them from the risk of a change in regulations.

No one forced the plaintiffs into the acquisitions of failing S & L's. Each acted voluntarily for the purpose of making money, a legitimate purpose, but not one the public must underwrite. It turned out for some that the bargains they struck were disastrous. That was due to their management's bad judgment, coupled with their decision to use the optional accounting practices.

I see no reason for reprinting my prior lengthy opinion to make minor editorial changes, *e.g.*, change "we" to "I" throughout. While vacated as a court decision, it remains in the books for anyone to read who may be interested. I will simply incorporate it here by reference.

LOURIE, *Circuit Judge*, dissenting.

I respectfully dissent.

I have no quarrel with the majority's conclusion that the government had a contractual obligation to permit the thrifts to count supervisory goodwill as regulatory capital and to accept the particular amortization periods. Moreover, there can be little doubt concerning the essential unfairness in Congress's denial of those contractual rights in its enactment of FIRREA.

However, I believe that the sovereign acts doctrine is a barrier to the thrifts' recovery under a breach of contract theory. In *Horowitz v. United States*, the Supreme Court held that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925). An embargo placed by the Railroad Administration on shipments of silk by freight did not obligate the government for breach of its contract to ship silk which the Ordnance Department had sold to the petitioner. This case is no different in principle.

The majority holds that the enactment of certain sections of FIRREA was not a "public and general" act because "legislation whose principal effect is to abrogate specific contractual rights does not immunize the government from contractual liability under the doctrine." In support of this principle, the majority cites *Everett Plywood Corp. v. United States*, 651 F.2d 723, 731-32 (Ct. Cl. 415 (1981) and *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. (1978). The majority also quotes the Court of Federal

Claims' decision in *Winstar II* stating that the government is not afforded immunity when it "acts not in its capacity as sovereign, but in its capacity as contractor." *Winstar Corp. v. U.S.*, 25 Cl. Ct. 541, 551 (1992). In addition, the majority refers to *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

Neither *Everett* nor *Sun Oil*, however, involved an act of general legislation as the asserted ground of contract breach. *Everett* dealt with an agency's termination of a single logging contract. The *Everett* court specifically stated that "[i]t would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in public forests." *Everett*, 651 F.2d at 732. Similarly, in *Sun Oil* the Secretary of the Interior denied a single drilling permit; there was no question of an alleged breach by legislation. In both *Everett* and *Sun Oil* the agency action was directed to a single contract, not all government contracts having a particular provision. Furthermore, unlike the legislation at issue in *Lynch* and *Perry*, FIRREA's change in the regulatory treatment of supervisory goodwill did not repudiate a debt of the United States. No authority of which I am aware suggests that a comprehensive piece of national legislation such as FIRREA is not a "public and general" sovereign act of government.

The majority, like the Court of Federal Claims, states that only certain sections of FIRREA are relevant to the issue at hand. Of course, defining the relevant governmental action narrowly focuses on the impact that FIRREA had on the particular parties before us. However, it also mischaracterizes the true nature of the governmental action. Congress did not

act only against certain thrifts or contracts; it acted to deal with the entire thrift system in order to save it. Doing so required dealing with the problem of underfunded thrifts to which the treatment of goodwill was integrally related.

Furthermore, I cannot see how Congress was acting in its contractual capacity, rather than in its role as sovereign, when it enacted FIRREA. The government was not buying goods or services when it acted. The legislation was intended to eliminate, nationally, practices that Congress thought were inconsistent with sound banking practice or that otherwise threatened the government's ability to insure the depositors of the thrifts. FIRREA, in fact, reshaped the entire thrift industry on a national level. Thus, one can hardly characterize Congress's act of passing FIRREA as "contractual" rather than sovereign. Moreover, the enactment of FIRREA was public and general; it was broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved.

That some members of Congress argued that enactment of certain provisions of FIRREA would break promises made to the thrifts does not mean that Congress's passage of FIRREA was not a sovereign act; it only states the problem and indicates the understandable distress felt by those members. Nor do such statements overcome the government's sovereign right to enact comprehensive national legislation for the common good without liability for breach of particularly affected contracts. Thus, while the thrifts certainly were victimized when they made commitments in reliance on accounting treatment agreed to by the regulatory agencies, I am unable to

conclude that the government was powerless to enact appropriate legislation in order to restructure the U.S. thrift industry.

APPENDIX B

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 92-5164

WINSTAR CORPORATION,
UNITED FEDERAL SAVINGS BANK,
STATESMAN SAVINGS HOLDING CORP.,
THE STATESMAN GROUP, INC.
AND AMERICAN LIFE AND CASUALTY INSURANCE COMPANY,

AND

GLENDALE FEDERAL BANK, FSB,
PLAINTIFFS-APPELLEES

v.

THE UNITED STATES, DEFENDANT-APPELLANT

May 25, 1993
ORDER GRANTING REHEARING AND REHEARING EN BANC AND AMENDING OPINION;
JUDGMENT VACATED AND OPINION WITHDRAWN
AUG. 18, 1993

Before: NIES, Chief Judge, RICH and NEWMAN, Circuit Judges.

NIES, Chief Judge.

In an opinion dated July 24, 1992, in Cases Nos. 90-773C and 90-772C, the United States Claims

Court[1] (Smith, C.J.) granted summary judgment in favor of plaintiffs Statesman Savings Holding Corp. and its affiliates and of plaintiff Glendale Federal Bank (FSB) on their breach of contract claims against the United States. Specifically, the court held that by enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464), the United States breached the contractual obligations of the Federal Home Loan Bank Board to the plaintiffs by changing regulatory capital standards.[2] The court then consolidated these cases with *Winstar Corp. v. United States*, No. 90-8C, and certified for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), its opinions granting summary judgment as to liability in the consolidated cases.[3] Having granted the government permission to appeal, 979 F.2d 216 (Fed.Cir.1992), we now reverse the judgment of liability on the breach of contract claims of all plaintiffs and remand for further proceedings consistent herewith.

I.

Much of the history of the savings and loan (or "thrift") industry consists of financial crisis followed

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[1] Effective October 29, 1992, the United States Claims Court was renamed the "United States Court of Federal Claims" by the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506, 4516 (1992).

[2] The court's opinion is reported at *Statesman Sav. Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992).

[3] The court's opinion in the former case is reported as *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990) ("*Winstar I*"), modified, 25 Cl.Ct. 541 (1992) ("*Winstar II*").

by regulatory response. During the Great Depression, 40 percent of the nation's $20 billion in home mortgages went into default, 1700 of approximately 12,000 thrifts failed, and thrift depositors lost roughly $200 million. H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 292 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 88-89 ("*House Report*"). In response, Congress created the Federal Home Loan Bank Board (Bank Board) and the Federal Savings and Loan Insurance Corporation (FSLIC) to provide deposit insurance and to regulate the previously unregulated thrift industry. *See* Federal Home Loan Bank Act, Pub.L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988)); Home Owners' Loan Act of 1933, Pub.L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461- 1468 (1988)); and Title IV of the National Housing Act, Pub.L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988)). Pursuant to this and to subsequently enacted statutory authority, these agencies have "promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.'" *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 145, 102 S.Ct. 3014, 3017, 73 L.Ed.2d 664 (1982) (citing *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F.Supp. 311, 316 (S.D.Cal. 1951)). During their corporate lifetimes, thrifts are subject to rules that restrict their lending and investment activities, impose reporting and record-keeping requirements, limit (at times) interest paid on deposits, and authorize their termination and burial by government-appointed receivers. In short, the thrift industry has become "one of the longest regulated and most closely supervised of public callings." *Cali-*

fornia Hous. Sec., Inc. v. United States, 959 F.2d 955, 958 (Fed.Cir.), cert. denied,—U.S.—, 113 S.Ct. 324, 121 L.Ed.2d 244 (1992) (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250, 67 S.Ct. 1552, 1554, 91 L.Ed. 2030 (1947)). This regulation and reform has converted the thrift industry into what Congress has described as "a federally-conceived and assisted system to provide citizens with affordable housing funds." *House Report* at 292; 1989 U.S.C.C.A.N. at 88.

Since their creation, the Bank Board and FSLIC have set minimum capital requirements—the regulatory function that is of interest in this appeal. As the Congress noted in the Committee Report on FIRREA:

> A sound tangible capital base is fundamental in promoting the safety and soundness of individual institutions and ultimately the stability of our financial system. Those institutions that operate without real capital are only risking the taxpayers' funds. With solid capital, losses related to risky activities are absorbed by the institutions' owners. Absent real and tangible capital, the first dollar lost is essentially an insurance fund dollar—with the losses ultimately borne by the taxpayer.

House Report at 429, 1989 U.S.C.C.A.N. at 225. These requirements have been the subject of numerous statutory and regulatory changes over the years. *See* Garn-St. Germain Depository Institutions Act, Pub.L. No. 97-320, 96 Stat. 1469 (1982) (codified throughout 12 U.S.C.); Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, 94 Stat. 132 (1980) (codified throughout 12 U.S.C. and at 15 U.S.C. §§ 1601-67 (1988)); Emergency

Home Finance Act, Pub.L. No. 91-351, 84 Stat. 450 (1970) (codified throughout 12 U.S.C.). The regulations governing thrift capital reserve requirements changed three times in 1982 alone. See 47 Fed.Reg. 3543 (codified at 12 C.F.R. § 563.13); *id.* at 31859 (codified at 12 C.F.R. § 563.13); *id.* at 52961 (codified at 12 C.F.R. § 563.13).

The "First" S & L Crisis of the 1980's, and the Bank Board's Response

The Bank Board significantly changed its regulatory capital standards in the early 1980's, in response to what was then the most severe industry crisis since the Great Depression. High inflation, coupled with a shift in Federal Reserve policy from stabilizing interest rates to controlling the money supply, had caused a dramatic increase in interest rates with an equally dramatic increase in the cost of funds to thrifts. *House Report* at 294-95, 1989 U.S.C.C.A.N. at 90-91. This meant that the thrifts had to pay more money to attract funds than they were earning on their long-term, fixed-rate mortgage portfolios. *Id.* For example, in August 1981, 53 percent of the thrift industry's interest-bearing liabilities were in short-term certificates of deposit paying high market rates of interest, while 85 percent of its assets were long-term mortgages fixed at below market interest rates. *Id.* at 296, 1989 U.S.C.C.A.N. at 92. The result of this unfavorable interest rate mismatch is not surprising. Thrifts lost about $4.5 billion in both 1981 and 1982. Eighty-one thrifts failed in 1981, 252 failed in 1982, and 102 failed in 1983. *Id.* FSLIC faced deposit insurance liability that threatened to exhaust the insurance fund. *See* Beesley, *FSLIC 1981 Annual Report*, FHLBB J., April 1982, at 16.

In 1981, the Bank Board and FSLIC decided this problem could be alleviated with greater incentives for the acquisition of failing thrifts by profitable institutions. The Chairman of the Bank Board testified that such acquisitions would result in "lower ultimate costs" to the FSLIC insurance fund than would a program of liquidation and payment of insured deposits. *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess., pt. 1, at 100 (1981). An important acquisition "incentive" provided by the Bank Board was a change in the regulatory accounting principles applied to thrift acquisitions to include several significant departures from generally accepted accounting principles (GAAP). Before the enactment of FIRREA, the Bank Board had broad discretion to prescribe the accounting standards used to measure compliance with its regulatory capital requirements. *See* 12 U.S.C. § 1467 (Supp. V 1987). These changes were later characterized by the Congress as "accounting gimmicks." *House Report* at 297-98, 1989 U.S.C.C.A.N. at 93-94.

One of these accounting gimmicks was "supervisory goodwill," a concept that is explained by the Claims Court's opinion in *Winstar I*.

> Under [the purchase method of accounting] . . . the book value of the acquired thrift's assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." In

> other words, the government agreed to allow the plaintiffs and others in similar circumstances to treat what was a deficit in capital as an asset. Goodwill was considered an intangible asset that could be amortized on a straight-line basis over a number of years. The difference between the aggregate fair market value of liabilities assumed by the acquirer and the aggregate fair market value of the failing thrift's assets was known as "supervisory goodwill," in the context of a supervisory merger, and was recorded on the resulting institution's balance sheet as an asset includable in capital for purposes of satisfying [the Bank Board's] minimum capital requirements.

21 Cl.Ct. at 113. With a wave of the accountant's pen, liabilities could be magically converted into assets; and the worse off the acquired thrift, the more the "supervisory goodwill" that could be booked as a capital asset for purposes of meeting regulatory capital requirements.

The other practice involved in this appeal is "regulatory accounting practice" (RAP) goodwill. As the Court of Appeals for the Fifth Circuit explained:

> When FSLIC provided cash assistance to the acquiror in connection with the acquisition, GAAP would have required that the amount of the assistance be treated as an asset of the acquired thrift, increasing that thrift's net worth and correspondingly decreasing the amount of goodwill that otherwise would have been created in the acquisition. FHLBB departed from GAAP, however, by permitting some or all of FSLIC's cash assistance to be recorded as a credit to the

> acquired thrift's new worth, without requiring that the amount of pre- assistance goodwill to be reduced. An asset equaling the amount of GAAP goodwill that otherwise would have been lost was termed "RAP goodwill."

Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 960 F.2d 1318, 1320 n. 5 (5th Cir.1992). Essentially, the RAP goodwill device permitted a double counting of any FSLIC monetary contribution—once as tangible capital, once as "goodwill" capital.

Allowing potential acquirors of ailing thrifts to book the full amount of supervisory and/or RAP goodwill as a capital asset stimulated many acquisitions that would have otherwise run afoul of regulatory capital requirements. As former Bank Board Chairman Richard Pratt stated in testimony before Congress:

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. The GAAP approach to purchase method accounting mergers provided a bridge which allowed the Bank Board to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it.

Savings and Loan Policies in the Late 1970's and 1980's: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess., No. 176, at 227 (1990). Each of the plaintiffs in this appeal participated in acquisitions whose viability was premised upon the Bank Board's then approved accounting practices.

The Plaintiffs' Acquisitions of Failing Thrifts

Winstar (in combination with United Federal), Statesman (in combination with American Life and Casualty), and Glendale all acquired ailing thrifts under this program to encourage such acquisitions. Winstar and Statesman negotiated their acquisitions directly with the Bank Board and FSLIC;[4] Glendale's merger was expressly conditioned on FSLIC approval. In the Winstar and Statesman deals, the plaintiffs and FSLIC negotiated and fixed their respective cash contributions to the acquired thrift.[5] Pursuant to statutory authorization, 12 U.S.C. § 1464(d)(11) (1982), the Bank Board reviewed and approved all of the acquisitions, examining inter alia the thrifts' projected compliance with regulatory capital requirements, 12 C.F.R. §§ 546.2(h)(6), 563.13 (1982), in accordance with its accounting standards. 12 C.F.R. § 545.20 (1982).

Both Statesman and Winstar signed an "Assistance Agreement" with FSLIC. These agreements set

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[4] In the case of Winstar, the acquired thrift had authorized the Bank Board to negotiate a merger or consolidation. In the case of Statesman, the acquired thrifts were all in FSLIC receivership.

[5] FSLIC contributed $5.5 million to the Winstar acquisition; Winstar contributed $2 million. FSLIC contributed $60 million to the Statesman acquisitions; Statesman contributed $21 million. FSLIC apparently made some cash contribution to the Glendale acquisition, but the specific amount is not of record.

forth FSLIC's promised monetary contribution and its other contractual responsibilities. None of these agreements expressly mention either purchase method accounting or supervisory goodwill. Both agreements, however, contain an "integration" clause which expressly incorporates any resolutions or letters of the Bank Board concerning the acquisition or merger in connection with its approval.

It is these letters and resolutions of the Bank Board that contain the only express reference to purchase method accounting or supervisory goodwill. On July 13, 1984, the Bank Board issued a "forbearance letter" confirming the following understanding respecting the Winstar acquisition: "For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by [United Federal] over a period not to exceed 35 years by the straight-line method." Similarly, in its March 11, 1988, resolution conditionally approving the Statesman acquisitions, the Bank Board acknowledged that "[t]he value of any unidentifiable intangible assets resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized . . . over a period not in excess of twenty-five (25) years by the straight line method." The "forbearance letter" issued to Statesman mentions the $26 million "regulatory capital" credit for FSLIC's cash contribution but not supervisory goodwill.

Glendale acquired its failing thrift (First Federal) in a different regulatory environment. Unlike the transactions involving Winstar and Statesman, this merger was negotiated between the thrifts without the participation of the Bank Board or FSLIC. However, the Merger Agreement signed by Glendale and First Federal was expressly conditioned upon FSLIC approval. Shortly after the Merger Agreement was signed, FSLIC and Glendale signed a "Supervisory Action Agreement" that approved the merger and provided for financial assistance from FSLIC. This contract also contained an "integration clause" that incorporated contemporaneous resolutions and letters of the Bank Board.

As in the case of Winstar and Statesman, the Bank Board issued resolutions and a forbearance letter but none of these expressly approve either purchase method accounting or supervisory goodwill. Resolution No. 81-710 does require that Glendale furnish a satisfactory accountant's opinion within 60 days of the merger's effective date which justifies the use of purchase method accounting, describes "any goodwill or discount of assets arising from the merger to be recorded on Glendale's books," and substantiates the reasonableness of amounts so booked and the resulting amortization periods and methods. Glendale was further obligated to submit a stipulation that any goodwill arising from the merger be determined and amortized in accordance with a Bank Board memorandum (R-31b) which describes its standards for the computation and use of supervisory goodwill arising from thrift mergers. On March 19, 1982, Glendale supplied the required opinion letter, setting forth its intention to amortize approximately $716 million of supervisory goodwill over a 40 year period and $18 million over 12 years. There is no evidence that the government regulators found this proposal unsatisfactory.

Supervisory goodwill was critical to all of these acquisitions. Even with the monetary contributions

of Winstar and FSLIC, the GAAP net worth of the thrift created by the Winstar transaction amounted to approximately a *negative* $6.7 million dollars. This capital shortfall was met by the $10.6 million in goodwill that was created by the purchase method accounting applied to this transaction. Similarly, the thrift created by the Statesman acquisitions was able to meet regulatory capital standards only because of the $25.8 million in supervisory goodwill and the $26 million regulatory capital credit generated in the transaction. The value of these "assets" is roughly equal to FSLIC's potential liability had the four failing thrifts that Statesman acquired been liquidated. In the case of Glendale, even with its capital reserve of $277 million and with FSLIC's contribution to the merger, the resulting thrift was left with an immediate GAAP capital deficiency of $460 million, which was met by more than $700 million of supervisory goodwill generated by the merger. Had either Winstar, Statesman, or Glendale been unable to count this goodwill as capital, its newly created thrift would have been subject to immediate liquidation.

The "Second" S & L Crisis of the 1980's and FIRREA

Subsequent to all these transactions, Congress enacted FIRREA. This sweeping reform of the thrift industry was compelled by the "precarious financial condition" of the FSLIC insurance fund and by waning consumer confidence in the savings and loan industry. *House Report* at 302, 1989 U.S.C.C.A.N. at 98. As of December 31, 1988, FSLIC was $56 billion in the red. *Id.* at 304, 1989 U.S.C.C.A.N. at 100. Consumer fears regarding the stability of the industry resulted in record withdrawals—$28.5 billion in the

first *quarter* of 1989, compared with a previous record *annual* withdrawal of $25 billion in 1980. *Id.* at 305, 1989 U.S.C.C.A.N. at 101.

Among the reforms implemented in FIRREA were the abolition of FSLIC and the Bank Board, with a transfer of FSLIC's insurance function to the Federal Deposit Insurance Corporation (FDIC) and a transfer of the Bank Board's regulatory function to the newly created Office of Thrift Supervision (OTS), under the supervision of the Department of the Treasury. *Id.* at 310, 1989 U.S.C.C.A.N. at 106. The abolition of the Bank Board was motivated in part by Congress's perception that the Bank Board's relaxed capital standards and sluggish regulatory enforcement, which contributed to the thrift crisis, were the product of an agency mission directed more toward promoting than toward regulating the industry. *Id.* at 302, 1989 U.S.C.C.A.N. at 98.

These capital standards were the target of specific legislation, and of congressional ire. Goodwill was described as "one of the remaining poisons of the savings and loan industry." 135 Cong.Rec. H2710 (daily ed. June 15, 1989) (statement of Rep. Price). As one member of Congress noted:

> Goodwill is not cash. It is a concept, and a shadowy one at that. When the Federal government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall.

Id. at H2571 (statement of Rep. Barnard). Intangible capital assets generated by the Bank Board's use of accounting gimmickry "masked the worsening financial condition of the industry, and the FSLIC, and

enabled many weak institutions to continue operating with an increasingly inadequate cushion to absorb future losses." *House Report* at 298, 1989 U.S.C.C.A.N. at 94. At the time FIRREA was enacted, supervisory goodwill accounted for $18 billion in regulatory capital. *Id.* at 497, 1989 U.S.C.C.A.N. at 293 (additional views of Reps. Annunzio, Kanjorski and Flake).

FIRREA charged OTS with developing and implementing "uniformly applicable capital standards for savings associations." 12 U.S.C.S. § 1464(t)(1)(A) (Law. Co-op.1992). But unlike previous legislation, FIRREA severely restricted the agency's discretion to set these standards, requiring a "leverage limit," a "tangible capital requirement," and a "risk-based capital requirement." *Id.* The "leverage limit" to be promulgated by OTS would require a thrift to "maintain core capital in an amount not less than 3 percent of [its] total assets." 12 U.S.C.S. § 1464(t)(2)(A). Similarly, OTS was obligated to set standards requiring thrifts "to maintain tangible capital in an amount not less than 1.5 percent of . . . total assets," 12 U.S.C.S. § 1464(t)(2)(B), and to meet risk-based capital requirements that were not materially lower than those applicable to national banks. 12 U.S.C.S. § 1464(t)(2)(C). FIRREA expressly excluded intangible assets such as goodwill from its definition of "tangible capital." 12 U.S.C.S. § 1464(t)(9)(C). It also expressly limited the quantity of supervisory goodwill (expressed as a percentage of total assets) that could be included in "core capital," gradually reducing the allowed percentage to zero by the end of 1994, 12 U.S.C.S. § 1464(t)(3), and limiting to twenty years the amortization period in the interim. 12 U.S.C.S. § 1464(t)(9)(B). Subsequently, OTS promulgated capital

regulations that included a similar phase-out schedule for the risk-based capital standards. 12 C.F.R. § 567.6(a) (1991).

With the passage of FIRREA, Winstar, Statesman, and Glendale had serious difficulties meeting the new statutory capital requirements. Both Winstar and Statesman are now in receivership.[6] Glendale avoided noncompliance, and thus shutdown, only by undergoing a costly and extensive restructuring.[7]

FIRREA Litigation in the District Courts

A number of thrifts, which like the plaintiffs here had made acquisitions in the early to mid-1980's, sued OTS in the district courts, seeking injunctions against the enforcement of the new statutory and regulatory capital standards against them. In each case, the thrifts advanced similar arguments. The thrifts contended that a savings provision of FIRREA, codified at 12 U.S.C. § 1437(a), prevented abrogation of the Bank Board's "agreements," as expressed in the resolutions, forbearance letters, and the like, regarding the regulatory treatment of goodwill assets generated in those mergers that it had approved. The thrifts argued further that, if FIRREA were construed to abrogate these "agreements," enforcement of these new capital standards would constitute a taking without just compensation

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[6] Even if Winstar had been able fully to count goodwill as regulatory capital, it may have failed nonetheless to meet the new statutory capital requirements. *See Statesman*, 26 Cl.Ct. at 924.

[7] Despite this restructuring, Glendale fell out of compliance with one of the regulatory capital standards in March of 1992. As of this date, it is still operating and has not been placed in receivership.

in violation of the Fifth Amendment. A number of thrifts obtained short-lived victories in the district courts preventing OTS from enforcing these standards against them. However, without exception these decisions were reversed on appeal. *Guaranty Fin. Servs., Inc. v. Director, Office of Thrift Supervision*, 742 F.Supp. 1159 (M.D.Ga.1990), *rev'd*, 928 F.2d 994 (11th Cir.1991); *Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 746 F.Supp. 1042 (D.Or.1990), *rev'd*, 951 F.2d 1093 (9th Cir.1991); *Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 761 F.Supp. 1277 (S.D.Miss.1991), *rev'd*, 960 F.2d 1318 (5th Cir.1992); *Carteret Sav. Bank, F.A. v. Office of Thrift Supervision*, 762 F.Supp. 1159 (D.N.J.1991), *rev'd*, 963 F.2d 567 (3d Cir.1992).[8]

Following the lead of the Courts of Appeals for the Eleventh Circuit in *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 996 (11th Cir.1991), and for the Sixth Circuit in *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332 (6th Cir.1991), the courts of appeals have unanimously held that FIRREA's "savings provision" does not exempt from its regulatory capital standards the supervisory goodwill created by these alleged "agreements" with the Bank Board. *See Security Sav. & Loan*; *see also Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203 (4th Cir.1992); *Carteret Sav.*

[8] In one case, a district court held that these forbearances were contractual obligations of the government, breached by FIRREA, and ordered recision as an appropriate remedy. *Charter Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 773 F.Supp. 809 (W.D.Va.1991), *rev'd*, 976 F.2d 203 (4th Cir.1992).

Bank, F.A. v. Office of Thrift Supervision, 963 F.2d 567 (3d Cir.1992); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C.Cir.1992); *Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 951 F.2d 1093 (9th Cir.1991). With respect to the requests for injunctions, the courts of appeals were nearly unanimous in declining to address the merits, holding that a claim for damages under the Tucker Act would be the appropriate remedy, if any, for an asserted takings claim. *Carteret*, 963 F.2d at 581-83, *Franklin Fed.*, 927 F.2d at 1341; *Far W. Fed. Bank*, 951 F.2d at 1100. Cf. *Transohio*, 967 F.2d at 612-13 (finding jurisdiction in the district courts over claims for specific (rather than monetary) relief under contract and takings theories). The two courts of appeals that have addressed a breach of contract-related issue held that the thrifts before them had not contracted with the government for the specific regulatory treatment of previously authorized supervisory goodwill. *Transohio*, 967 F.2d at 618-24; *Charter Fed.*, 976 F.2d at 210-213.

Court of Federal Claims Litigation

As the government was accumulating its victories in the courts of appeals, Winstar, Statesman, Glendale, and a number of other thrifts similarly situated were prosecuting suits in the United States Claims Court, now the Court of Federal Claims. The plaintiffs claim, *inter alia*, that FIRREA's regulatory capital requirements, as implemented by OTS, breached their contracts with the government by repudiating the regulatory treatment of goodwill that they had been promised by the Bank Board.

Winstar's contract claim was the first decided. On cross-motions for summary judgment, the trial court ruled that Winstar had an implied-in-fact contract with the government under which it "would be permitted to continue to treat supervisory goodwill as a capital asset and to amortize it for 35 years, regardless of changes in generally accepted accounting principles (GAAP) or in regulatory policy." *Winstar I*, 21 Cl.Ct. at 115.[9] The court concluded that this contract did not impair the power of Congress to regulate, but Winstar was entitled to damages for the resulting breach of the contract. *Id.* at 116. The court analogized Winstar's claim to a suit for compensation under the Fifth Amendment, in which one accepts the power of Congress to regulate but requests compensation for the exercise of that power. *Id.*

After additional briefing, and on the government's request for clarification, the court issued a second opinion, affirming its previous holding that an implied in fact contract existed giving Winstar a right to treat supervisory goodwill as a capital asset for 35 years and holding that the government breached this right when Congress enacted FIRREA limiting the amortization period to 20 years. *Winstar II*, 25 Cl.Ct. at 549. The court discussed at length and distinguished the Supreme Court's decision in *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*), on the ground it did not involve a contract.

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[9] The court did not rely upon the Assistance Agreement in reaching this conclusion. Rather, it cited the forbearance letter, as well as several internal Bank Board documents, as evidence of the government's "intent." *Winstar I*, 21 Cl.Ct. at 115.

In *POSSE*, the Court held that Congress could abrogate, as it did, the right a state previously had to withdraw from the Social Security system. *Id.* Finally, the Claims Court concluded that because the regulatory capital reforms of FIRREA were enacted "to take away the plaintiffs' rights to use supervisory goodwill" and not for the public good, the government was not absolved of contract liability under the "Sovereign Acts Doctrine." 25 Cl.Ct. at 551- 53.

Applying its *Winstar* analysis, the trial court also granted summary judgment in favor of Statesman and Glendale in *Statesman Sav. Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992). In these instances, however, the court found express, rather than implied-in-fact contracts. Specifically, the court found that the integration clause of the Statesman Assistance Agreement incorporated contemporaneous Bank Board resolutions into the contract. *Statesman*, 26 Cl.Ct. at 912. Because the Bank Board resolution approving the Statesman merger provided for the use of the purchase method of accounting, "the government and Statesman had an express contract for the use of that accounting method." *Id.* The court similarly found, based upon the contemporaneous documents in the Glendale transaction, that the government had entered into an express contract under which the Bank Board "agreed to forebear from exercising its authority to bring enforcement proceedings against Glendale for failure to meet regulatory capital standards." *Id.* at 913. Finding that "the government possessed no contractually-based right allowing it to abrogate without liability the parties' express contract," the court held the enactment of FIRREA to be a breach of these contracts not within the scope of the Sovereign Acts

Doctrine. *Id.* at 915. The court then consolidated these cases with *Winstar* and certified for interlocutory appeal its decisions holding the government liable on the plaintiffs' breach of contract claims. *Id.* at 924.

II.

The government does not dispute that the Bank Board and FSLIC understood that the purchase method of accounting would be applied to these mergers, that the resulting supervisory goodwill would be booked as regulatory capital, and that amortization over a period longer than 20 years was approved. Nor does it dispute this understanding was memorialized in contemporaneous documents—the resolutions and forbearance letters. Conversely, the thrifts do not dispute that the government allowed them to proceed in accordance with their understanding until enactment of FIRREA. The dispute here concerns not what was agreed to at that time but whether the parties further agreed that there would be no change in accounting and capital requirements.*

The government contends these documents were made in the exercise of the Bank Board's regulatory function and represent a statement of compliance with then-existing statutory and regulatory requirements which requirements, however, were subject to change. The plaintiffs contend and the Claims Court found that these documents were generated by the Bank Board acting in a contractual capacity and that the statements therein regarding the amortization of supervisory goodwill over periods of twenty to forty years constituted an unconditional promise by the

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* Editor's Note: Amended on Rehearing, see p. [104a].

Bank Board to that time period which was specifically bargained for by the plaintiffs and subsequently breached by Congress.

The syllogism advanced by the plaintiffs and the Claims Court is that the "government" entered a contract and the "government" breached a contract by enacting FIRREA, treating both the legislative and the executive branches as the contracting entity labelled the "government." If we assume the "government" (Bank Board, FSLIC) promised that the plaintiffs could continue the treatment of the "goodwill" created by the merger as regulatory capital, the "government" (Congress) then reneged by enacting FIRREA's capital reforms. *Quod erat demonstrandum.* However, the merger of the Bank Board's purported obligations under these contracts with the exercise of Congress's power to legislate for the general public good is too simplistic. As the Supreme Court has admonished, "[T]he two characters which the government possesses as a contractor and as a sovereign cannot be thus fused." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925) (quoting *Jones & Brown's Case*, 1 Ct.Cl. 383, 384, 1865 WL 1976 (1865)). Congress frequently enacts legislation affecting the performance of contracts (both private and governmental), creating additional benefits to and/or burdens upon the contracting parties. In the case of private parties, the burden of such a change in the law (or the benefit) is usually borne (or enjoyed) by the party on which it falls, unless responsibility is otherwise assigned in the contract.[10] Similarly, when the United States is sued

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[10] *See Northern Indiana Public Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir.1986); *Connick v. Teachers*

as a contractor, the "Sovereign Acts Doctrine" absolves it of liability "for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz*, 267 U.S. at 461, 45 S.Ct. at 344 (Railroad Administration embargo on shipments of silk); see also *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990) (the Urarium Mill Tailings Radiation Control Act); *Tony Downs Foods Co. v. United States*, 209 Ct.Cl. 31, 530 F.2d 367 (1976) (Executive Order lifting price freeze); *J.B. McCrary Co. v. United States*, 114 Ct.Cl. 12, 84 F.Supp. 368 (1949) (Executive Order freezing labor wages); *Gothwaite v. United States*, 102 Ct.Cl. 400, 1944 WL 3658 (1944) (regulations of War Production Board).

Unlike the doctrine of sovereign immunity, the Sovereign Acts Doctrine does not confer a privilege upon the government that would not be enjoyed by private parties. To the contrary, it ensures that parties contracting with the government will not have rights against the government that the same contract would not afford against a private party. As the Supreme Court explained:

> In this court the United States appear simply as contractors; and they are to be held liable only

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Ins. & Annuity Ass'n, 784 F.2d 1018, 1022 (9th Cir.), *cert. denied*, 479 U.S. 822, 107 S.Ct. 91, 93 L.Ed.2d 43 (1986); *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298, 306 (5th Cir.1955); *Sabine Corp. v. ONG W., Inc.*, 725 F.Supp. 1157, 1177 (W.D.Okla.1989); *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So.2d 1234, 1240 (La.App. 3d Cir.), *cert. denied*, 526 So.2d 800 (La.1988); *Sheldon-Seatz, Inc. v. Coles*, 319 Mich. 401, 29 N.W.2d 832, 835 (1947).

> within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Horowitz, 267 U.S. at 461, 45 S.Ct. at 344 (quoting *Jones*, 1 Ct.Cl. at 384).

A private party does not necessarily promise that Congress will act only for the benefit of his promisee's interests under the contract. He is liable for detrimental actions only to the extent provided for in the contract. Likewise, the sovereign acts of the government are not automatically swept within the scope of performance to which it is bound by the promises of its contracting agents. Warranties as to the state of the law are not implied between private parties. Nor may such warranties be implied against the government when it acts in its contracting role. As in the case of private parties, the government bears responsibility for FIRREA's change in regulatory capital standards only to the extent that the plaintiffs, the Bank Board, and FSLIC have provided in their contracts.

On the other hand, every act of Congress does not *ipso facto* fall within the Sovereign Acts Doctrine. The United States cannot repudiate its contractual obligations with impunity merely by acting through Congress. *See Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) (invalidating legislation authorizing the redemption of United States Liberty Bonds in currency other than gold); *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) (invalidating legislation repudiating the

government's obligation to pay war risk insurance benefits to veterans).

The Claims Court found that the purpose of FIRREA "was to take away *plaintiffs' rights* to use supervisory goodwill," *Winstar II*, 25 Cl.Ct. at 552 (emphasis added). We cannot agree. Rather we conclude that FIRREA's capital reforms are "general and public" acts which the Sovereign Acts Doctrine applies. Congress found that "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts." *House Report* at 310, 1989 U.S.C.C.A.N. at 106. In addition to banning future gimmickry, Congress chose to "unmask" that which had been practiced in the past. As Congressman Schumer noted in his Additional Views to the Committee Report:

> Not counting goodwill would cause some thrifts that appear to have adequate capital with goodwill counted not to be in compliance with the standards. These thrifts argue that by not including goodwill in capital, the government would be taking healthy thrifts and making them unhealthy. But whether a thrift is financially healthy does not depend on how capital is defined. Clearly, lowering the capital standards so that all thrifts no matter how weak are in compliance would not magically make all weak thrifts strong. Similarly, allowing undercapitalized thrifts to count gimmicks as capital does not make them any better capitalized nor any less of a threat to the taxpayers.

1989 U.S.C.C.A.N. at 408. The touchstone of the cases recognizing a sovereign act is that the congressional

action had general applicability for the public good. That is the case here. Plaintiffs were not singled out as targets.[11] The accounting methods which had been approved were disapproved for all of the industry because of the perceived harm to the public. Nor, we might add, did all thrifts which had taken over failing thrifts fail as a result of this general legislation.

In any event, concluding as we do that the FIRREA legislation falls within the Sovereign Acts Doctrine does not end the inquiry here. As indicated, where a change in the law affects performance under a contract between private parties, a court must review the contract to determine which party bore the risk of such change. Thus, we must make a similar analysis of the subject agreements, the matter to which we now turn.

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[11] The following two cases cited by the dissent which addressed an agency defense to a clear breach of contract (not congressional action) on the ground that it falls within the Sovereign Acts Doctrine are inapt. As indicated, the Sovereign Acts Doctrine may not be invoked where only particular contracts are the targets of legislation repudiating a government obligation to a specific party. The same would be true of agency action. *See Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723, 732 (1981) (Agency's termination of single logging contract for environmental reasons not sovereign act. "[It] would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in all public forests"); *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 817 (1978) (Secretary of Interior's actions were not "actions of public and general applicability, but were actions directed principally and primarily at plaintiff's contractual right to install a [particular oil] platform.").

III.

Contract interpretation presents a question of law that we review *de novo*. *Reliance Ins. Co. v. United States*, 931 F.2d 863, 865 (Fed.Cir.1991). The government contends that the contracts between the plaintiffs, FSLIC, and the Bank Board cannot be construed so as to obligate the Bank Board to measure regulatory capital in a manner inconsistent with what Congress later required in FIRREA. We agree.

In concluding that contracts similar to those present in this case did not obligate the Bank Board to regulate contrary to FIRREA, the Court of Appeals for the District of Columbia Circuit applied "the rule of construction laid down by the Supreme Court, that one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." *Transohio*, 967 F.2d at 618 (quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 24 (1990)). *Accord Charter Fed.*, 976 F.2d at 212 (applying rule to Bank Board resolutions); *Guaranty Fin. Servs.*, 928 F.2d at 998-1000 (applying rule to Bank Board forbearance letter referenced in Capital Maintenance Agreement between the thrift and FSLIC). This "unmistakeability" doctrine is derived primarily from the decision of the Supreme Court in *POSSE*, *supra*, in which certain State and public agencies argued they had contract rights (arising from so-called "Section 418 Agreements" with the Secretary of Health and Human Services) to withdraw from the Social Security System that were breached by Congress's enactment of section 103 of

the Social Security Amendments Act of 1983, Pub.L. No. 98-21, 97 Stat. 71 (codified at 42 U.S.C. § 418(g) (1988)). 477 U.S. at 50, 106 S.Ct. at 2395. In rejecting this contention, the Court noted that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2396 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982)). Construing the Section 418 Agreements "to avoid foreclosing exercise of sovereign authority," *POSSE*, 477 U.S. at 53, 106 S.Ct. at 2397, the Court concluded these Agreements were subject to Congress's power to alter the Social Security law. *Id.* at 54, 106 S.Ct. at 2397.

The plaintiffs posit that this rule of construction is applicable only where Congress has expressly reserved its power to amend a statute, *see Sinking-Fund Cases*, 99 U.S. (9 Otto) 700, 720-21, 25 L.Ed. 496 and 504 (1879), or where the subject contract expressly incorporates a statute that is subject to amendment. *See POSSE*, 477 U.S. at 53-54, 106 S.Ct. at 2397. The first proposition is ludicrous. An express reservation of the power to amend, be it in the Banking Code, the Internal Revenue Code, the Lanham Act or any other congressional enactment, is not a prerequisite to the exercise of that power. Congress may amend statutes as part of its constitutional authority to legislate. This authority is ubiquitous even if not expressly acknowledged or reserved. *See Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 629 (8th Cir.), cert. denied, 498 U.S. 896, 111 S.Ct. 246, 112 L.Ed.2d 205 (1990) (citing *POSSE* and recognizing Congress' power to amend a

statute). The plaintiffs were on notice that Congress had altered in the past and could alter in the future the statutory/regulatory burdens to which they were subject. *California Hous. Sec.*, 959 F.2d at 959. Nor was it incumbent upon the parties to expressly acknowledge that their performance, whether contractual or otherwise, must conform to applicable law.

For a regulatory agency like the Bank Board to abdicate by contract its duty to regulate in accordance with subsequent acts of Congress requires, at the very least, an unmistakable statement of its intent to do so. But we question whether even this would suffice. The Court has stated that the government's power as a sovereign "cannot be contracted away." *North Am. Commercial Co. v. United States*, 171 U.S. 110, 137, 18 S.Ct. 817, 828, 43 L.Ed. 98 (1898). More recently, it has noted, in the context of the Contract Clause, that a State need not "adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). As Justice Brennan stated in dissent:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent .... The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

United States Trust, 431 U.S. at 45, 97 S.Ct. at 1529; *see also Transohio*, 967 F.2d at 620-24. To this we add our own observation that because private parties cannot hope to curtail by contract the sovereign acts of Congress, *Horowitz* and its progeny would suggest that the government's agents of the executive branch, acting by way of contracting authority, cannot do so either.

We need not decide here, however, whether an agency's putative waiver of sovereign authority would ever be enforceable. None of the contracts in this appeal contain language that, under the strict rule of construction in *POSSE*, would obligate the Bank Board to regulate in a manner inconsistent with subsequent acts of Congress. The plaintiffs assert and the Claims Court found such an obligation in the forbearance letters and Bank Board resolutions *supra*, in which the government recognized that intangible assets could be counted as regulatory capital. At most, these statements acknowledge the permissibility at that time of that accounting procedure. They do not commit the Bank Board to a future course of performance under an immutable regulatory standard. The thrifts point to the approved amortization periods for supervisory goodwill of several decades as precluding a change. However, the length of the amortization periods of these intangible assets simply reflects compliance with the Bank Board's then-existing regulations and accounting standards.[12] The Bank Board's acknowledgment that these time

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[12] For example, the Bank Board's *Statement of Financial Accounting Standards No. 72* provided that goodwill be amortized over a period *no greater than* the estimated remaining life of the long-term, interest- bearing assets.

periods were acceptable *at the time of the mergers* is not an acknowledgement that the law or even regulations would allow treatment of supervisory goodwill as regulatory capital throughout the entire amortization periods. *See Charter Fed.*, 976 F.2d at 211 ("The resolutions issued by the [Bank Board] in connection with the mergers merely granted the agency's approval of the merger and the accounting practices employed by Charter in connection therewith.") No *promise* was made committing the Bank Board to maintenance of the same capital treatment over the various amortization periods. *See Transohio*, 967 F.2d at 619 (passive language in forbearance letters too ambiguous to satisfy the *POSSE* rule).

To the contrary, we conclude that the plaintiffs assumed the risk that the law would change. The Supervisory Assistance Agreement with Glendale acknowledges that "[n]othing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." Similarly, both the Winstar and the Statesman Assistance Agreements provide that "[n]othing in this Agreement shall require any unlawful action or inaction by either party." The thrifts contend and the Claims Court found that the "unlawful action" clauses must be read to require compliance only with *then-existing* law, otherwise the government would be free to modify the Agreements by statute, counter to the provision of these Agreements requiring that modifications be executed in writing by the parties. *Statesman*, 26 Cl.Ct. at 914. This improperly mixes the sovereign and contracting functions of the government. FIRREA was not a modification of their contracts. It was a sovereign act of Congress that modified the regulatory environ-

ment in which the thrifts and OTS (the Bank Board's successor) would act. Furthermore, to limit these unqualified "unlawful action" clauses to then-existing laws and regulations would violate the rule of *POSSE* that waivers of sovereign authority must, at least, be explicit. The plaintiffs, the Bank Board and FSLIC all agreed to act in accordance with the law. They did not limit this obligation to those laws in effect at that time or laws that made their contract less burdensome or more profitable.

In addition, the "Accounting Principles" clauses in the Assistance Agreements of Statesman and Glendale, while not specifically addressing the issue here, show a recognition by the contracting parties that "the governing regulations and the accounting principles" would be subject to clarification, interpretation, or *amendment* by the Bank Board or its successor (here, OTS).[13] There is no restriction on

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[13] As an example, the "Accounting Clause" in the Assistance Agreement of Statesman reads:

> [A]ny computations made for the purposes of this Agreement shall be governed by generally accepted accounting principles as applied on a going concern basis in the savings and loan industry, except that where such principles conflict with the terms of this Agreement, applicable regulations of the Bank Board or [FSLIC], or any resolution or action of the Bank Board approving or adopted concurrently with this Agreement, then this Agreement, such regulations, or such resolution or action shall govern. In the case of any ambiguity in the interpretation or construction of any provision of this Agreement, such ambiguity shall be resolved in a manner consistent with such regulations and the Bank Board's resolution or action. If there is a conflict between such regulations and the Bank Board's resolution or action, the Bank Board's resolution or action shall govern. For the

what regulations were subject to amendment. In any event, the regulations here involved are essentially irrelevant to this case. The plaintiffs' quarrel is with the new statute, FIRREA, which did away with accounting gimmicks and extended amortization periods. The regulations merely conform to the statute.*

Recognizing the difficult, if not insurmountable, burden of showing that their contracts obligated the Bank Board to adhere to the regulations in effect at the time of the mergers notwithstanding subsequent acts of Congress, the plaintiffs argue that, while the capital requirements could be changed by Congress, their contract claims remain viable. Per the plaintiffs, it is irrelevant that their contracts do not restrict the Bank Board's duty to regulate in accordance with subsequent acts of Congress since they seek money damages for breach not specific performance.

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purposes of this section, the governing regulations and the accounting principles shall be those in effect on the Effective Date *or as subsequently clarified, interpreted, or amended by the Bank Board or the Financial Accounting Standards Board* ("FASB"), respectively, or any successor organization. [Emphasis added.]

By lifting the third sentence out of context, the dissent finds an express agreement that the negotiated forbearance and accounting procedures were guaranteed to continue despite a change in the law. It is not surprising that no party makes the argument that the right asserted by Statesman and Glendale to use purchase method accounting and extended amortization time periods involve an "ambiguity . . . in this [Assistance] Agreement." It does not. Moreover, the change was the enactment of a new statute not a mere administrative change in a regulation.

* Editor's Note: Amended on Rehearing, see p. 104a.

This distinction in remedies, though significant to the law of takings, is not relevant to the plaintiffs' claims for breach of contract. A breach requires a binding promise. 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1290 (3d ed. 1968). Specific performance and damages are merely alternative remedies for breach, for which damages is the primary remedy. *Id.* at § 1338. Where no contractual duty exists, no breach of contract is possible and no judgment for damages can be obtained. 5 Arthur Linton Corbin, *Corbin on Contracts* § 993 (1964). Because these contracts did not obligate the Bank Board (or OTS) to regulate in a manner inconsistent with FIRREA, the change in treatment of goodwill does not violate a contractual duty and cannot support a claim for damages for breach.

IV.

The appellants and amici[14] raise numerous overlapping and intertwining arguments, all of which have been considered although not specifically discussed. Several merit at least comment. The "illusory" contract argument is one. The Claims Court concluded that construing these contracts to permit the Bank Board (or OTS) to regulate as

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[14] The Chamber of Commerce of the United States, The Aerospace Industries Association of America, The Electronic Industries Association, The Shipbuilders Council of America, Inc., Litton Industries, Inc., Amwest Savings Association, The Adam Corporation/Group, The Globe Savings Bank (FSB), Phoenix Capital Group, Inc., Old Stone Bank (FSB), Old Stone Corporation, Franklin Federal Bancorp, The Long Island Savings Bank (FSB), The Long Island Savings Bank of Centereach (FSB), Keystone Holdings, Inc., and American Savings Bank (FA).

subsequently mandated by FIRREA would render the contracts "illusory" because the Bank Board "would in effect be agreeing to abide by its promises only so long as it unilaterally decided to keep those promises." *Statesman*, 26 Cl.Ct. at 914-15. The court suggested that a contract which permits the "government" to perform at its "unrestricted pleasure" is really not a contract at all. *Id.* (quoting 17 C.J.S. *Contracts* § 98 (1963)).

As previously indicated, these contracts are no more "illusory" than a contract between private parties whose profitability is affected or determined by subsequent legislative action. A promisee whose contract was rendered unprofitable by FIRREA cannot hold his promisor accountable, unless the contract assigned the burden of such legislation to the latter. *See* note 10, *supra*. Contractors that desire to immunize their bargains from the vagaries and uncertainties of future legislation have developed a variety of devices for doing so. A *force majeure* clause is one such device. *Northern Ind.*, 799 F.2d at 274-75. Price floors and price ceilings are another. *Id.* at 278. Indemnity provisions are yet another. Similarly, a contractor may expressly fix its performance to correspond to then-existing regulations. *Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed.Cir.1992). But a contract that lacks any of these (or similar) devices and thus leaves a private party vulnerable to changes in the law that render its performance unprofitable is not "illusory." It is merely unprofitable.

For the reasons discussed in section II *supra*, contracts between a private party and a contracting agent of the government are no different. We have concluded that under the *POSSE* rule of construc-

tion, the Bank Board, in all of these contracts, did not bind the "government" generally or itself particularly to regulate plaintiffs only in accordance with past legislation. Merely by signing these contracts, the Bank Board did not assume responsibility for the effects of subsequent legislation. The plaintiffs could have obtained an enforceable promise shifting the risk to the government. But they did not do so. *See, e.g., Amino Bros. Co. v. United States*, 178 Ct.Cl. 515, 372 F.2d 485, 491, *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the sovereign act."); *Piggly Wiggly Corp. v. United States*, 112 Ct.Cl. 391, 81 F.Supp. 819, 823 (1949) (sovereign acts may harm party that has contracted with government unless contracting party protected against price in the event of the act). Although others appear to have dealt with the risks of future changes in the law in their contracts, plaintiffs here did not. Brief for Amici Curiae Keystone Holdings, Inc. and American Savings Bank, F.A. at 12. There is no *force majeure* clause in any of the plaintiffs' contracts. There is no clause that limits the plaintiffs' future capital contribution (for purposes of meeting regulatory capital standards) to a fixed sum. There is simply no clause that obligates FSLIC to indemnify any of the plaintiffs against future regulatory changes in the capital standards.[15]

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[15] In the Winstar Assistance Agreements and in the Glendale Supervisory Action Agreement, the government did promise to indemnify the thrifts against undisclosed liabilities and litigation challenging the merger. The Glendale contract also

Because nothing in these contracts shifts that risk to the Bank Board, that risk must be borne by the plaintiffs.

V

We conclude that the plaintiffs had no contract right to have the goodwill generated by their acquisition(s) treated as regulatory capital. All of the subject contracts left the Bank Board (and OTS) free to regulate in accordance with subsequent acts of Congress, specifically FIRREA. Thus, there was no contractual promise by the government which could be breached. Because none of the contracts assigned to FSLIC or the Bank Board the risk of any subsequent change in capital standards by Congress, the plaintiffs bear that burden here. We, therefore, reverse the Claims Court's judgment of liability in each of these consolidated cases.

Our disposition of these appeals does not dispose of all claims for recovery asserted by the plaintiffs. In particular, plaintiffs have asserted constitutional claims for just compensation for the taking of their property. To the extent a plaintiff's other claims are not premised upon the taking of a *contract right* to continue to use goodwill as regulatory capital, such claims remain for decision. Accordingly, their cases are remanded for further proceedings consistent herewith.

VI

Each party will bear its own costs.

REVERSED AND REMANDED.

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states which party would bear the risk of change in interest rates. These indemnification obligations are not involved here.

PAULINE NEWMAN, Circuit Judge, dissenting.

There has been a good deal of litigation engendered by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), including litigation arising out of arrangements similar to those of the three cases here consolidated, wherein solvent banks and other investors were encouraged by the government to enter into merger arrangements for the purpose of salvaging failing or failed thrift institutions. Such salvage operations included the infusion of substantial sums of private as well as governmental money. The solvent banks contributed their resources on the promise by the government that the capital requirements of the merged banks could be met, *inter alia*, by capitalization of "supervisory goodwill" and the long-term amortization of the capital account. These promises were memorialized in lengthy contracts that set forth the details and integrated the arrangements, including the implementing forbearance letters and Bank Board resolutions. These documents were explicit as to the financial and other obligations of all parties, the conditions and mutual promises by which these commitments involving many millions of dollars were made. It is not disputed that these arrangements would not have been entered into but for the conditions that were agreed to by the government, after extensive negotiation. These conditions, which enabled these arrangements, were made illegal by FIRREA or by the regulations implementing FIRREA.

In the three cases at bar the merger agreements were made in 1981, 1984, and 1988. After enactment of FIRREA in 1989 the government required these merged thrift institutions to conform with the new

accounting standards and capital requirements. In two of the three cases these changed requirements immediately placed the merged banks into non-compliance, and these institutions were promptly placed in receivership.

The panel majority, in a lengthy analysis, determines that these banks are not entitled to specific performance of their preexisting arrangements. That question, although stressed in the government's briefs, is not at issue in this case. That question was extensively litigated in the regional district and circuit courts, in connection with various other banks' requests for relief in the form of specific performance of the particular arrangements between such banks and the relevant government agency. However, that remedy is not within the Court of Federal Claims' Tucker Act authority, and the issue of specific performance is not before the Federal Circuit. Nor are any contracts other than those of these three sets of plaintiffs.

Although litigation has been extensive, the regional circuits did not reach the question of the financial consequences of the enactment of FIRREA and of the resultant impossibility of performance of the various arrangements. The regional circuits uniformly held that these questions of money damages are excluded from their purview. The issues and remedies of financial recompense are decided for the first time in these suits in the Court of Federal Claims.

In these three appeals the plaintiff banks do not dispute that Congress has the power to enact FIRREA and to foreclose continued performance of these contracts. The issue, as the Court of Federal Claims made clear, is whether the government is

liable for the financial consequences of these acts, not whether the government had the authority to act.

The panel majority, rejecting the reasoning and conclusions of the Court of Federal Claims, holds that there is no governmental liability because there were no contracts between the government and these thrift institutions. The panel majority also holds that if there were contracts, the entire risk of impossibility of performance must be borne by the nongovernmental party. The rationale for this latter ruling appears to be that the government may abrogate contracts without liability, under the "sovereign acts doctrine".

Since there are indeed contracts as to all three of these thrift groups, and immunity under the sovereign acts doctrine is not warranted in these cases, the Court of Federal Claims correctly decided that the government is liable for the financial consequences of its acts. Indeed, governmental responsibility is not a new idea in this nation's law, and the reasoning of the Court of Federal Claims is solidly supported in contract law and in the application of the sovereign acts doctrine to this case.

A

The sovereign acts doctrine appeared in Court of Claims jurisprudence early in that court's existence, in *Deming v. United States*, 1 Ct.Cl. 190, 1865 WL 2004 (1865). It relates to acts of government in exercise of the responsibility to make and administer laws for the general welfare. As a "doctrine" it is an apothegm for the principle that there is a distinction between governmental acts for general and public benefit, and acts of government when dealing with specific persons and businesses. When the govern-

ment acts as a contractor with a specific private entity, this doctrine provides no immunity:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

Sinking-Fund Cases, 99 U.S. (9 Otto) 700, 719, 25 L.Ed. 496 and 504 (1879). However, when the government acts as legislator/regulator in furtherance of the general welfare, an incidental and unintended impact on specific preexisting contracts to which the government is a party does not thereby increase the responsibility or liability of the government as contractor. As the Supreme Court explained, public and general acts of government that are not directed to particular contracts do not impose liability upon the government beyond that which it has as a party to the contract:

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign .... "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it has entered with private persons."

Horowitz v. United States, 267 U.S. 458, 461, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925) (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384-85, 1865 WL 1976 (1865)). Illustrations are seen, *e.g.*, in *Amino Bros. Co. v. United States*, 178 Ct.Cl. 515, 372 F.2d 485, 491, *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) (action by the Army Corps of Engineers in flood control on the Smoky Hill River held a sovereign act for public benefit; there was no express or implied promise to contractor working downriver that the flood control power would not be exercised); *Piggly Wiggly Corp. v. United States*, 112 Ct.Cl. 391, 419-433, 81 F.Supp. 819, 823 (1949) (price control and allocation of plywood by the Office of Price Administration was a sovereign act; it was proper for Quartermaster Corps of War Department to terminate contract for convenience with appropriate recompense to contractor.)

It is quite clear that the sovereign acts doctrine does not mean that the government can walk away from any contract to which it is a party, avoiding all contractual liability, whenever there is intervening legislative or regulatory action. The sovereign acts doctrine "is not a boundless justification for governmental non-liability." Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U.Tol.L.Rev. 29, 41 (1975). In *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) the Supreme Court considered the application of the sovereign acts doctrine to a congressional resolution that declared that payment in gold was "against public policy" and

that all past and future governmental obligations would be paid with then legal tender. The Court held that persons holding Treasury bonds that provided for payment in gold coin had a binding and enforceable contract, and that:

> Congress can [not] disregard the obligations of the Government at its discretion . . . . We do not so read the Constitution.

Perry, 294 U.S. at 350, 55 S.Ct. at 434. In *Freedman v. United States*, 162 Ct.Cl. 390, 320 F.2d 359 (1963) the Court of Claims explained that the sovereign acts doctrine

> does not relieve the government from liability where it has specifically undertaken to perform the very act from which it later seeks to be excused.

Id. at 402, 320 F.2d 359. According to these precepts, acts of government that directly abrogate existing contractual obligations, even if undertaken for reasons of general welfare, are not immune from liability. *E.g.*, *Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723, 731-32 (1981) (cancellation of timber contract due to government's concern for environment is not immune from liability as a sovereign act); *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 817 (1978) (government's denial of drilling permit and consequent breach of drilling lease due to government's environmental concerns is not immune as a sovereign act).

Applying precedent, the Court of Federal Claims held that the abrogation of the arrangements the government had entered into with these banks was not immune from liability as a sovereign act. As

further discussed, no error in this analysis or conclusion has been shown.

B

It can not be seriously disputed that in its arrangements with these banks the government acted as a contractor. These were commercial arrangements, entered into after extensive arms-length negotiations and upon mutual exchanges of consideration. They are embodied in lengthy documents, with all requisite governmental approvals, signed by authorized persons, and including the specific accounting and amortization terms that were essential conditions. Pertinent documents were integrated and cross-referenced, in textbook compliance with the rules of contract. There is no asserted ambiguity.[1] Indeed, it will come as a surprise to the many lawyers involved in these multi-million dollar transactions that they did not, after all, succeed in making a contract. The government's disavowal of having made binding contracts comes with poor grace, not only in view of the government's encouragement of these arrangements when they were made, but also because performance was accepted by the government for several years.

The Court of Federal Claims, considering the question of the relationship of these arrangements to the enactment and administration of FIRREA, found that the various banks that had merged with failed or failing thrifts, and the terms of the mergers whereby the existing capital requirements were met, were well known to the legislators. Recognition of these

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[1] The panel majority appears to misapprehend my position, for there is no issue of ambiguity.

arrangements pervades the legislative record. *E.g.*, H.R.Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 498 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 293-94 (additional views of Mr. Annunzio, Mr. Kanjorski and Mr. Flake):

> Simply put, [FIRREA] has reneged on the agreements that the government entered into concerning supervisory goodwill . . . . Clearly, the agreements concerning the treatment of goodwill were part of what the institutions had bargained for. Just as clearly, [FIRREA] is abrogating those agreements.

H.R.Rep. No. 54, 101st Cong., 1st Sess., pt. 5, at 27-28 (1989), *reprinted in* 1989 U.S.C.C.A.N. 397, 410-11 (additional views of Mr. Hyde):

> Overnight, as the accounting standards are re-legislated, [institutions with supervisory goodwill agreements] will become 'unsafe and unsound' for purposes of federal banking law . . . . [T]he current terms of [FIRREA] could end up punishing the very institutions that came to the aid of taxpayers in the early part of this decade . . . . I believe that many of these institutions have a case based in law, in equity, and in fundamental fairness.

135 Cong.Rec. H2706 (daily ed. June 15, 1989) (Statement of Rep. Crane):

> In the early 1980's a number of savings and loans were asked by our government to acquire ailing thrifts in order to help the government and the taxpayers avert paying billions of dollars in bailout funds . . . . How many institutions will

> trust the government after seeing Congress abrogate these deals?

135 Cong.Rec. H2783 (daily ed. June 15, 1989) (Statement of Rep. Ackerman):

> In its present form, [FIRREA] would abrogate written agreements made by the U.S. government to thrifts that acquired failing institutions by changing the rules in the middle of the game . . . .

Criticisms such as the following reinforce the view that these contracts were targeted, and not an incidental side-effect of a general and public law. 135 Cong.Rec. H2705 (daily ed. June 15, 1989) (statement of Rep. Gonzalez):

> In blunt terms, the bank Board and FSLIC Insurance fund managers entered into bad deals—I might even call them steals.

Recognizing that it was abrogating these agreements, Congress sought advice on the consequences of enactment of FIRREA; the record shows that it received inconsistent advice. *Compare* Letter from the Comptroller General of the United States to the Senate Committee on Banking, Housing and Urban Affairs (August 27, 1990), advising that there could be liability for breach of contract and unconstitutional taking of property, *with* the statement of Rep. Gonzalez, at 135 Cong.Rec. H2705 (daily ed. June 15, 1989) that the Department of Justice advised that FIRREA would result in no contractual or constitutional claims. This record is pertinent today because it shows that Congress knew of these arrangements, and knew that their performance would be affected by the new requirements set by FIRREA.

There is no error in the ruling of the Court of Federal Claims that the effect on these banks was a foreseen and intended consequence of the legislation and its regulatory implementation, thus negating immunity as a sovereign act.

It is an unwarranted criticism of the Court of Federal Claims to state that it improperly mixed the sovereign and contracting functions of government, for it is clear that the Court understood and correctly applied the distinction. The sovereign act doctrine does not mean that the legislative branch is somehow a different "government" than the executive branch, and that the United States is not liable for contract-affecting actions of the executive in administering legislation. To the contrary, the protection of persons who contract with the government through its agencies is essential to the nation's operations. The Court of Federal Claims correctly concluded that the government could not, without liability, abrogate the specific contracts that the government had made with thrift institutions. The court stressed that the issue under the Tucker Act is solely of financial liability.

The government, and the panel majority, rely heavily on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) ("*POSSE*") wherein the Court held that Congress could remove the right of state government to withdraw from the Social Security system. However, *POSSE* did not hold that Congress could simply abrogate any contract right. In *POSSE* the Court held that there was no bargained-for consideration, and therefore no contract right to start with. 477 U.S. at 55-56, 106 S.Ct. at 2398. The Court stressed that the provision of

Social Security benefits to state employees was a gratuitous benefit bestowed upon the states by Congress. Although the government here presses a far broader interpretation, *POSSE* does not hold that Congress may without liability abrogate contracts between the United States and others except for situations where the government made an "unmistakable" promise not to do so.

The Court of Federal Claims did not make the mistake of confusing the government's right to legislate in the public interest with the government's obligations in specific contractual commitments. This distinction is a necessary implementation of the principles by which our government does business with its citizens. These principles are fundamental to our history. In *Murray v. Charleston*, 96 U.S. (6 Otto) 432, 24 L.Ed. 760 (1878) the Court rejected the theory, offered then as it is now, that a contractual promise can be abrogated through the exercise of inherent sovereign authority. In *Perry v. United States*, discussed *supra*, the Court quoted Alexander Hamilton as follows:

> [W]hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it.

294 U.S. at 351 n. 2, 55 S.Ct. at 435 n. 2 (citing 3 Hamilton's Works, 518, 519). As the Court in *Perry* reaffirmed, although the government can not agree not to exercise its sovereign power in the future, "the right to make binding obligations is a competence attaching to sovereignty." 294 U.S. at 353, 55 S.Ct. at 436.

C.

The contracts here at issue were entered into after extensive negotiation, with concessions and commitments by both sides. The contracts in the three suits differ in their terms, for each is specific to the circumstances of the acquired and acquiring banks.

The Court of Federal Claims correctly held that these elaborate, lengthy, detailed contemporaneous documents, including documents incorporated by reference, are contracts. Both the government and the banks so treated them during the years of performance in accordance with their terms. Both the government and the banks transferred many millions of dollars on the basis of these arrangements. On the "mere signing", as the panel majority puts it, Winstar and United Federal together contributed two million dollars and assumed additional millions in liabilities; Statesman Savings and American Life and Casualty together contributed twenty-one million dollars and assumed additional millions in liabilities; and Glendale Federal assumed $734 million in liabilities. All of these commitments were conditioned on the specific accounting procedures and amortization requirements that were negotiated and agreed to in order to enable these thrifts to survive while new funds and new management sought to resuscitate them. Further, the government does not

dispute that it has retained the funds contributed by the private banks.

I will not repeat the careful analysis by the Court of Federal Claims of these three sets of documents. I take note of the panel majority's apparent belief that documents incorporated by reference, or conditions subsequent, or integration clauses, do not a contract make. Indeed, it is curious to see the panel majority treat as meaningless the negotiated amortization periods on the reasoning that these periods "complied with the Bank Board's then-existing regulations." These amortization terms were essential to the viability of each bank's investment. That they were not illegal when adopted is not surprising. To hold that their legality when adopted means that they "do not commit the Bank Board", despite their explicit incorporation in contract documents with and by the Bank Board, is a strange view of contract law.

The government argues that the banks simply gambled that the law governing these mergers would not change, and thus are not entitled to redress when the law did change. The contracts show that the parties indeed recognized this possibility, and provided for it in various ways. Thus the "Accounting Principles" clauses in the Winstar and the Statesman agreements reflect the parties' recognition that the accounting principles might in the future be "subject to clarification, interpretation or amendment", and provide that "[i]f there is a conflict between such regulations and the Bank Board's resolution or action [adopted concurrently with this agreement], the resolution or action shall govern."[2]

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[2] Although the panel majority states that this language is "lifted" out of context, the context in the Accounting Clause

The government thus expressly agreed that in the event of regulatory change, the negotiated forbearances and accounting procedures would govern. This is surely not an assumption of risk by the contractor, an acceptance of the "vagaries and uncertainties of future legislation", quoting the panel majority. It is a negotiated contract provision that removed this foreseen risk by dealing specifically with an aspect that was critical to the viability of the venture.

D

These contract terms, and the bargained-for consideration on both sides, illuminate a basic flaw in the panel majority's reasoning with respect to the sovereign acts doctrine. For if the enactment of FIRREA is viewed as a sovereign act for the general welfare, unencumbered by specific contractual arrangements, then the relationship between the government as contractor, on the one hand, and these banks on the other hand, would be the same as for any other set of contracting parties. In such case, when the contract is no longer capable of performance on its agreed terms, (whether because of legislative or agency action or Act of God) the laws of contract do not automatically place the burden of accommodation on one side only. *See* Restatement (Second) of Contracts § 272 (discussing forms of available relief such as rescission when contract performance has

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reinforces the intent that the contract terms shall prevail in case of future conflict. This clause states a straightforward commercial understanding of what the parties intended should a foreseeable event occur. This is simply good contract draftsmanship, for it was fundamental that it was the accounting principles that made the arrangements viable.

become impracticable), § 264 (governmental regulation can render performance impracticable and be subject to relief), and § 377 (remedy of restitution in cases of impracticability and frustration of contractual purpose). The government is not simply excused from further obligations without liability. Thus even if the enactment of FIRREA were treated as a sovereign act it would be incorrect to place on these banks the entire burden of impossibility of performance of their contracts, as has here been done.

However, if the enactment or administration of FIRREA is not viewed as a sovereign act with respect to these contracts, in that it was known and expected that this law would interfere with or make impossible the continued performance of specific contracts by changing the rules of capital compliance, then the government has made performance of its own contracts impossible: not by *force majeure*, as the majority suggests, but by governmental act. That the government may be empowered to legislate in this way, and that a desired public policy is served, does not mean that it can be done without liability to those with whom the government had made a different commitment. The government is not exonerated of responsibility with respect to specific commercial contracts to which it is a party, whether the breach is by executive or legislative action.

Thus, on any application of the sovereign acts doctrine, these plaintiffs have a remedy for breach of contract. I would affirm the decisions of the Court of Federal Claims in these three cases.

ORDER

Aug. 18, 1993.

The appellees, Glendale Federal Bank, FSB, and Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Co., filed separate petitions for rehearing and suggestions for rehearing in banc. Upon consideration by the panel of the petitions for rehearing and of the responses filed by the appellant at the request of the panel, and the supplemental submissions, it is:

ORDERED that the petitions for rehearing are GRANTED, but only to make the following changes in the text of the opinion:

Page 20:

lines 16-17: Delete "agreed to" and insert therefor—understood respecting how goodwill would be treated—

line 17: Delete "further"

Page 32:

lines 2-3: Delete "quarrel is with" and insert—arguments focus on—

line 4: After "periods" insert—not on the regulations—

lines 4-5: Delete "the regulations merely . . . statute."

Judge Newman's comments on the changes are attached hereto.

Upon consideration of the suggestions for rehearing in banc thereafter by the circuit judges

who are in regular active service, the suggestions are ACCEPTED.

It is FURTHER ORDERED that the judgment of the court entered on May 25, 1993, is vacated and that the opinion of the court, as amended, accompanying the said judgment is withdrawn.

The parties will be advised in due course if additional briefing is needed and of the date of hearing in banc.

NEWMAN, Circuit Judge, commenting on the Order amending the text of the majority opinion.

The reasons for the panel majority's changes are not stated. Thus I write separately to point out that:

(1) These cases do not turn on whether the written arrangements between these banks and the government are designated as "understandings" instead of "agreements". Such semantics do not control the fundamental issues raised.

(2) The now-deleted sentence that "The regulations merely conform to the statute" was indeed incorrect. However, the further statement that the regulations were not placed at issue is also incorrect, for this litigation unambiguously relates to the statute as implemented by the regulations.

APPENDIX C

UNITED STATES CLAIMS COURT

Nos. 90-773C, 90-772C

STATESMAN SAVINGS HOLDING CORP., ET AL., AND GLENDALE FEDERAL BANK, FSB, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[Filed July 24, 1992]

OPINION

SMITH, Chief Judge.

Plaintiffs Statesman Savings Holding Corp. (Statesman) and Glendale Federal Bank, FSB (Glendale) both acquired failing savings and loan institutions prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[1] Both Statesman and Glendale, like the plaintiffs in *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990) (*Winstar I*), claim that the enactment of

[1] Pub.L. 101-73, 103 Stat. 183 (Aug. 9, 1989). FIRREA is codified at various sections of Title 12 of the United States Code.

FIRREA breached their contracts with the government and effected a taking in violation of the fifth amendment. Presently before the court are Statesman's and Glendale's Motions for Summary Judgment as to Liability. After careful consideration of the briefs submitted by the parties, and after oral argument, the court grants both motions. The court defers consideration of Statesman's and Glendale's taking claims under the well-established principal that constitutional claims should be addressed only if a plaintiff's other bases for recovery do not afford complete relief. *See Sun Oil Co. v. United States*, 572 F.2d 786, 215 Ct.Cl. 716, 769 (1978). The court also consolidates these cases with *Winstar Corp. v. United States*, No. 90-8C, and certifies them, with *Winstar*, for interlocutory appeal to the United States Court of Appeals for the Federal Circuit.

FACTS

On April 21, 1992, this court issued its opinion in *Winstar Corp. v. United States*, 25 Cl.Ct. 541 (1992) (*Winstar II*), a case presenting legal issues identical to those in dispute here and in other related cases.[2]

[2] As of the date of this opinion, complaints have been filed in fifteen other cases besides *Winstar*, *Statesman* and *Glendale*: *La Van v. United States*, No. 90-581C (filed June 28, 1990); *Barron Bancshares, Inc. v. United States*, No. 90-830C (filed Aug. 28, 1990); *Hometown Financial, Inc. v. United States*, No. 90-843C (filed Aug. 30, 1990); *Hughes v. United States*, No. 90-878C (filed Sept. 5, 1990); *Suess v. United States*, No. 90-981C (filed Sept. 14, 1990); *Castle v. United States*, No. 90-1291C (filed Sept. 25, 1990); *American Heritage Bancorp v. United States*, No. 90-3982C (filed Dec. 3, 1990); *Anderson v. United States*, No. 91-34C (filed Jan. 10, 1990); *Karnes County Savings v. United States*, No. 91-993C (filed Mar. 7, 1991); *Globe Savings Bank, FSB v. United States*, No. 91-1550C (filed

In *Winstar II*, the court considered the nature and effect of pre-FIRREA negotiated agreements between acquiring savings and loans, such as Statesman and Glendale, and the government, acting through the Federal Home Loan Bank Board (FHLBB) and the Federal Savings and Loan Insurance Corporation (FSLIC). This court ruled in *Winstar I* that the agreement between the government and the acquiring savings and loan in that case constituted a contract. This court held in *Winstar II* that the contract was a traditional one, like those upheld by the Supreme Court in *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) and *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and not a government grant as found in *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*). This court further found that the enactment of FIRREA breached that contract in light of the sovereign acts doctrine. This court deferred consideration of the *Winstar* plaintiffs' taking claim. *See Winstar II*, 25 Cl.Ct. at 543 n. 4.

On the day it issued its opinion in *Winstar II*, the court ordered the parties in all *Winstar*-related cases to address how the court's opinion impacted upon the existence of a contract and the breach of that contract in their particular cases. In a status conference on

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Oct. 29, 1991); *California Federal Bank, FSB v. United States*, No. 92- 138C (filed Feb. 28, 1992); *Secor Bank, FSB v. United States*, No. 92-247C (filed Apr. 8, 1992); *Republic Savings Bank, FSB v. United States*, No. 92- 265C (filed Apr. 13, 1992); *Glass v. United States*, No. 92-428C (filed June 25, 1992); and *Coast Federal Bank, FSB v. United States*, No. 92-466C (filed July 9, 1992).

May 4, 1992, the court further ordered that an expedited briefing schedule be set in the *Statesman* and *Glendale* cases so that the court could promptly rule on the two plaintiffs' pending motions for summary judgment and thereby enable the parties to seek an interlocutory appeal before the United States Court of Appeals for the Federal Circuit with *Winstar II*. Although Statesman and Glendale moved for summary judgment independently, the court heard oral argument on both motions on June 23, 1992 because *Statesman* and *Glendale* present common legal issues not treated in *Winstar II*. The court resolves Statesman's and Glendale's motions in one opinion.

I. Statesman

At issue in this case is Statesman's 1988 acquisition of four insolvent savings and loans, one in West Palm Beach, Florida, First Federated Savings Bank, and three in Waterloo, Iowa, First Federal Savings, Peoples Savings & Loan, and The Perpetual Savings & Loan. The acquisition was a result of year-long negotiations between Statesman and FHLBB and FSLIC. The negotiations began in 1987 when Statesman approached the FHLBB about acquiring a subsidiary of an insolvent savings and loan institution in Florida, First Federated. In response to Statesman's proposal, FSLIC advised Statesman that the government could assist Statesman in its acquisition of the subsidiary only if it acquired First Federated itself. FSLIC also advised Statesman that under then-existing regulations entities such as Statesman (which were affiliated with investment banking companies) could acquire a failing savings and loan only if the acquired thrift's assets exceeded $500

million. To reach this asset level, FSLIC offered to combine Statesman's acquisition of First Federated with three other thrifts located in Iowa. Statesman accepted FSLIC's offer.

As part of the transaction, FSLIC agreed to provide Statesman with a cash contribution of $60 million. A portion of that contribution, $26 million,[3] was to be permanently credited to Statesman's regulatory capital for purposes of meeting FHLBB's minimum capital requirements. This $26 million figure has been referred to throughout the litigation as a "capital credit."[4] FSLIC also agreed to allow Statesman to employ the purchase method of accounting for the transaction. Under this method, Statesman was permitted to report as an asset includible in capital for purposes of satisfying minimum capital requirements the difference between the aggregate fair market value of liabilities assumed by Statesman and the aggregate fair market value of the assets of the four acquired institutions (including the $60 million cash contribution made by FSLIC). *See generally Winstar I*, 21 Cl.Ct. at 113. This difference in value, known as "supervisory goodwill," was $25.8 million. Statesman was permitted to amortize this intangible goodwill asset on a straight-line basis over a twenty-five year period. In addition to agreeing to acquire the four insolvent thrifts, Statesman agreed

[3] Part of the capital contribution, $5 million, was in the form of a 10-year subordinated debenture delivered to FSLIC by Statesman. Statesman was obligated under the terms of that debenture to pay back $5 million of the $26 million total capital contribution made to Statesman by FSLIC.

[4] "Capital credit" has been a part of only one other *Winstar*-related case before the court, *Globe Savings Bank, FSB v. United States*, No. 91-1551.

to contribute $21 million in cash to the thrifts' capital base.

The terms of the agreement between the government and Statesman were memorialized in an Assistance Agreement. A key provision of the Agreement was an "integration clause," which specified the documents that would control the interpretation of the parties' agreement.

> This Agreement, together with any resolutions adopted by the Bank Board [FHLBB] and documents delivered at closing . . . constitutes the entire agreement between the parties and supersedes all prior agreements . . . excepting only the Acquisition Agreement, the Merger Agreements and any resolutions or letters concerning the Acquisition, the Mergers of this Agreement issued by the Bank Board or the [FSLIC] in connection with the approval of the Acquisition, the Mergers and this Agreement, *provided*, however, that in the event of any conflict, variance, or inconsistency between this Agreement and the Acquisition Agreement or the Merger Agreements, the provisions of this Agreement shall govern and be *binding on all parties* insofar as the rights, privileges, *duties*, *obligations*, and *liabilities of the parties* are concerned.

Assistance Agreement at 96-97 (March 11, 1988) (emphasis in original). One of the documents deemed controlling by the Assistance Agreement was FHLBB Resolution 88-169, which was issued contemporaneously with the Assistance Agreement. In that Resolution, the government expressly agreed to

provide Statesman with the aforementioned capital credit.

> Twenty-one million dollars of the initial contribution by [FSLIC] to [Statesman], and five million dollars of the principal amount of the Subordinated Debenture issued to the FSLIC . . . shall be credited to the regulatory capital account of [Statesman] . . . .

FHLBB Resolution 88-169 at 19 (March 11, 1988); *see also* Assistance Agreement at 45 ("$26 million of the contribution made [by FSLIC] . . . shall be credited to [Statesman's] regulatory capital account and shall constitute regulatory capital . . . ."). In that same Resolution, the government also expressly assented to the use of the purchase method of accounting for the acquisition.

> The value of any unidentifiable intangible assets [goodwill] resulting from accounting for the Acquisition and the Mergers in accordance with the purchase method of accounting may be amortized by [Statesman] over a period not in excess of twenty-five (25) years by the straight line method . . . .

FHLBB Resolution No. 88-169 at 20. In accordance with the terms of the Assistance Agreement, the parties consummated the transaction on March 11, 1988.

In 1989, FIRREA became law. FIRREA altered existing regulations both to reduce the amount of supervisory goodwill includible in calculating core capital and to permit supervisory goodwill to be

amortized for no more than 20 years.[5] *See* 12 U.S.C. §§ 1464(t)(3)(A) and (9)(B); *Winstar I*, 21 Cl.Ct. at 114. FIRREA also established new regulatory capital standards.[6] After FIRREA took effect, Statesman fell below the three new capital standards established by the Act: $13.8 million below the tangible capital standard; $13.2 million below the core capital standard; and $14.5 million below the risk-based capital standard. But for FIRREA, Statesman would be $10.8 million above the tangible capital standard; $11.4 million above the core capital standard; and $7.7

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[5] FIRREA mandates the phasing out of the use of supervisory goodwill in calculating core capital. Prior to January 1, 1992, the amount of supervisory goodwill includible in core capital cannot exceed 1.5% of total assets. Thereafter, the amount of supervisory goodwill includible in core capital declines each year, so as not to exceed 1.0% of total assets through December 31, 1992; not to exceed 0.75% of total assets through December 31, 1993; and not to exceed 0.375% of total assets through December 31, 1994. 12 U.S.C. § 1464(t)(3)(A).

[6] FIRREA requires federally insured thrifts to satisfy three capital standards: "tangible," "core," and "risk-based" capital. 12 U.S.C. §§ 1464(t)(1), (2) and (3). Thrifts must maintain "tangible" capital in an amount not less than 1.5% of assets excluding supervisory goodwill. 12 U.S.C. § 1464(t)(2)(B). Thrifts must maintain "core" capital in an amount not less than 3% of assets. 12 U.S.C. § 1464(t)(2)(A). Supervisory goodwill may be used in calculating "core" capital, but subject to the schedule set forth in 12 U.S.C. § 1464(t)(3)(A), which decreases the includible amount. *See* note 5, *supra*. Thrifts must maintain "risk-based" capital in an amount not "materially" less than that required by the Comptroller of the Currency for national banks. 12 U.S.C. § 1464(t)(2)(C). Supervisory goodwill is includible for purposes of calculating "risk-based" capital. *Id*.

million above the risk-based capital standard.[7] As a result of Statesman's failure to meet the FIRREA capital standards, the Office of Thrift Supervision (OTS) appointed the Resolution Trust Corporation (RTC) as receiver for Statesman on July 26, 1990. Thus, but for the enactment of FIRREA, Statesman would be operating today.

II. Glendale

The transaction at issue in this case is Glendale's 1981 acquisition of a failing savings and loan institution in Fort Lauderdale, Florida, First Federal Savings and Loan Association of Broward County. Unlike the transactions at issue in *Winstar* and *Statesman*, Glendale negotiated the merger of First Federal into Glendale without initial input from FHLBB or FSLIC. Presumably motivated by economic necessity, First Federal initiated the transaction by contacting Glendale about a possible merger. After negotiation, the parties executed on November 12, 1981 a Merger Agreement pursuant to which the merger ultimately occurred.

The Merger Agreement was expressly conditioned on FSLIC's approval of the merger and its assent to allowing Glendale to use the purchase method of accounting. On November 19, 1981, seven days after the Merger Agreement was signed, Glendale and FSLIC entered into a Supervisory Action Agreement, which manifested the government's approval of

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[7] By contrast, the court notes that even if the government had honored its obligation to the *Winstar* plaintiffs, Winstar would still most likely have fallen below the three new FIRREA capital standards.

the terms of the merger as set forth in the Merger Agreement.

> [Broward] had incurred significant losses and its financial condition is such that remedial action must be taken.
>
> FSLIC has decided . . . to provide assistance as set forth in this Agreement, having determined that [Broward] is in danger of default and that the nature and/or amount of such assistance would be less than the losses FSLIC would sustain upon the liquidation of [Broward] through a receivership accompanied by the payment of insurance of accounts.

Supervisory Action Agreement at 1-2 (November 19, 1981). As was the case in the Statesman transaction, the Agreement between Glendale and FSLIC contained an integration clause which specified the documents that would control the interpretation of the parties' agreement. The clause provided:

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the FHLBB or the FSLIC, *provided*, however, that in the event of any conflict, variance or inconsistency between this Agreement and the Agreement of Merger, the provisions of this Agreement shall govern and be binding on all parties insofar

> as the rights, privileges, duties, obligations, and liabilities of the FSLIC are concerned.

Supervisory Action Agreement at 14 (emphasis in original). One of the documents FHLBB issued contemporaneously with the Agreement was a "forbearance letter" dated November 19, 1981. In that letter, the government manifested its intention to forbear from exercising its authority to bring enforcement proceedings against Glendale for failing to satisfy regulatory capital requirements "following the merger." FHLBB forbearance letter (November 19, 1981). The letter, however, did not specifically address the use of the purchase method of accounting for the merger.

Another document designated in the Agreement as controlling the parties' relationship, FHLBB Resolution 81-710, however, did reflect the government's understanding that supervisory goodwill would be part of the transaction. That resolution provided:

> Not later than sixty days following the effective date of the merger, Glendale shall furnish an opinion from its independent accountant, satisfactory to the Supervisory Agent, which (a) indicates the justification under generally accepted accounting principles *for use of the purchase method of accounting for its merger with Broward*, (b) specifically describes, as of the Effective Date, any goodwill or discount of assets arising from the merger to be recorded on Glendale's books, and (c) substantiates the reasonableness of amounts attributed to goodwill and the discount of assets and the resulting amortization periods and methods; and

> Glendale shall submit a stipulation that any goodwill arising from this transaction shall be determined and amortized in accordance with FHLBB Memorandum R-31b; . . .

FHLBB Resolution 81-710 at 2 (November 19, 1981) (emphasis added). The FHLBB Memorandum R 31b referenced in the Resolution specifically dealt with the use of supervisory goodwill in acquisitions of failing or insolvent thrifts. In its first paragraph, the Memorandum stated that its purpose was to

> set[] forth guidelines for the staff of the Federal Home Loan Bank Board in reviewing the proposed accounting, under generally accepted accounting principles, for goodwill arising in the acquisition of a savings and loan association. This intangible asset generally results when the purchase price for an institution exceeds the fair value of the assets acquired, reduced by the fair value of any liabilities assumed. It only arises when the accounting for a business combination is in accordance with the purchase method.

FHLBB Memorandum R 31b at 1 (September 1, 1981). The Memorandum also established forty years as the maximum amortization period for supervisory goodwill. *Id.* at 2.

On March 19, 1982, Glendale supplied to FHLBB the opinion letter outlining the amount of supervisory goodwill used in the merger as required by FHLBB Resolution 81-710. The opinion letter stated:

> Pursuant to the provisions of the Agreement of Merger between [Glendale] and Broward dated November 20, 1981 and the Supervisory Action Agreement between [Glendale] and the Federal

> Savings and Loan Insurance Corporation (FSLIC) dated November 20, 1981, upon the effective date of November 20, 1981, [Glendale] accounted for the acquisition using the "Purchase Method" of accounting . . . . $18,000,000 of the resultant goodwill is associated with the savings deposit base and will be amortized on a straight line basis over 12 years, the estimated life of the savings deposit base. The remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years as [Glendale] believes that the remaining goodwill has an indefinite life since it is related to expansion of operations into an entirely new market area.

Letter from David T. Hansen of Glendale to FHLBB (March 19, 1982) (forwarding Peat, Marwick, Mitchell & Co. letter to Glendale). The government does not dispute that the terms of the opinion letter were deemed "satisfactory to the Supervisory Agent" as required by FHLBB Resolution 81-710. It is also uncontroverted that the government manifested its approval of the terms set forth in the opinion letter *prior* to the effective date of the Supervisory Action Agreement. In a letter from H. Brent Beesley, then-Director of FSLIC, to FHLBB dated November 19, 1981, FSLIC recommended the use of the purchase method of accounting for the merger. Beesley explicitly referred to a Peat, Marwick, Mitchell & Co. opinion letter dated November 10, 1981 setting forth the specific amount of supervisory goodwill projected to be amortized pursuant to the merger, assuming the use of the purchase method of accounting. It was only after sending this letter that FSLIC entered into the Supervisory Action Agreement. Taken in conjunction with contemporaneously issued FHLBB letters and resolutions, then, the Supervisory Action Agreement called for the use of the purchase method of accounting and the amortization of an intangible supervisory goodwill asset over periods of twelve and forty years. *See* FHLBB Press Release at 3 (November 20, 1981) ("Glendale Federal will account for this merger under the purchase accounting method which provides that assets and liabilities will be recorded at a fair value on the effective date (11/19/81). Any excess of fair value of liabilities over fair value of assets will be recorded as goodwill. A portion of the goodwill has been associated with the savings deposit base and amortized over the 12-year estimated life of the savings base. Remaining goodwill will be amortized on a straight line basis over 40 years.").[8]

After the enactment of FIRREA in 1989, Glendale remained in compliance with all three new regulatory capital standards set forth in the Act, the "tangible," "core," and "risk-based" capital requirements as defined by 12 U.S.C. § 1464(t)(2). As of March 31, 1992, however, Glendale has fallen out of compliance with the "risk-based" capital standard. In addition, in calculating these three capital amounts, Glendale has

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[8] The only cash payment involved in the transaction was made pursuant to the interest rate protection provision of the Agreement. Under that provision, Glendale and FSLIC agreed that each would make payments to the other (according to terms set forth in the Agreement) for a five-year period depending on whether the interest rates rose or fell from the time of the merger. If interest rates rose, FSLIC would pay Glendale; conversely, if they dropped, Glendale would pay FSLIC. Pursuant to this provision, Glendale ultimately paid FSLIC $18.4 million.

been required by FIRREA to exclude considerable amounts of supervisory goodwill. In calculating its "tangible" capital, Glendale has been required to exclude from the original $734.6 million of supervisory goodwill agreed to by the parties all goodwill not amortized prior to the enactment of FIRREA. *See* 12 U.S.C. § 1464(t)(2)(B). In calculating its "core" and "risk-based" capital, Glendale has been required under 12 U.S.C. § 1464(t)(3)(A) to deduct all but approximately $185 million of the $734.6 million of goodwill originally contemplated by the parties. Because of FIRREA, Glendale also cannot amortize over forty years the amount of goodwill that is allowable under the Act. *See* 12 U.S.C. §§ 1464(t)(3)(A) and (9)(B). FIRREA has also caused Glendale to suffer monetary loss. The exclusion of supervisory goodwill has: required Glendale to implement costly measures to compensate for the loss of goodwill from its regulatory capital amounts; constrained capital resources and thereby restricted business opportunities; and adversely affected the confidence of Glendale's investors.

DISCUSSION

I. The Existence of a Contract

A. *Statesman*

In *Winstar I*, this court examined the various documents memorializing the parties' intentions and determined that an implied-in-fact contract existed. *Winstar I*, 21 Cl.Ct. at 114-15. Here, by contrast, the government readily concedes that an express contract existed, at least in regard to the $26 million capital credit extended by the government to Statesman. In regard to the supervisory goodwill at issue, the government simply argues that because there was

an express contractual relationship, embodied in the Assistance Agreement, the absence of any reference in that Agreement to the use of the purchase method of accounting necessarily implies that there was no contractual agreement as to that term. Plaintiff conversely argues that, taken together, the documents comprising the parties' relationship expressly provide for the use of supervisory goodwill.

The issue of whether a contractual right to use supervisory goodwill existed turns on a proper interpretation of the integration clause in the Assistance Agreement. As noted above, the integration clause provided that the parties' contractual relationship was defined not only by the Assistance Agreement, but also by contemporaneously issued FHLBB resolutions and documents relevant to the transaction: "This [Assistance] Agreement, together with any resolutions adopted by the Bank Board [FHLBB] and documents delivered at closing . . . constitutes the entire agreement between the parties and supersedes all prior agreements . . . ." Assistance Agreement at 96-97. The plain language of this clause indicates that all FHLBB resolutions delivered at closing constituted binding provisions of the parties' express contract. The clause thus clearly encompasses FHLBB Resolution 88-169 which was issued the same day as the Assistance Agreement. Accordingly, because FHLBB Resolution 88-169 provided for the use of the purchase method of accounting, the court finds that the government and Statesman had an express contract providing for the use of that accounting method. This reading of the integration clause finds support from those courts construing similar assistance agreements. *See, e.g., Hansen Savings Bank v. Office of Thrift Supervision*, 758 F.Supp. 240, 245

(D.N.J.1991) (finding an FHLBB resolution and forbearance letter incorporated by an integration clause as part of the parties' agreement); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 617-18 (D.C.Cir.1992) (same); *Carteret Savings Bank, FA v. Office of Thrift Supervision*, 762 F.Supp. 1159, 1171-72 (D.N.J.1991) (same), *rev'd on other grounds*, 963 F.2d 567 (3d Cir.1992).

B. *Glendale*

Although the specific terms of the agreement between the government and Glendale are not as easily derived from the relevant documents as is the case in *Statesman*, the court nonetheless is compelled to reach the same conclusion: that an express contract existed between the government and Glendale. As in *Statesman*, the government and Glendale entered into an express agreement (the Supervisory Action Agreement) regarding the government's approval and role in Glendale's acquisition of a failing savings and loan. Also like *Statesman*, the express agreement refers explicitly to documents calling for the use of the purchase method of accounting.

The government maintains, however, that there was no contractual relationship, express or implied, between the government and Glendale. As it does in the *Statesman* case, the government argues that the Supervisory Action Agreement constitutes the only expression of the parties' understanding concerning the merger of Glendale and Broward and the government's role in that merger. In support of its position, the government points to the language of the integration clause, which is materially the same as the one at issue in *Statesman*.

> This Agreement, together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, *excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith by the FHLBB or the FSLIC* . . . .

Supervisory Action Agreement at 14 (emphasis added). The government contends that the FHLBB resolutions and letters issued contemporaneously with the Agreement do not reflect actual terms of the parties' contractual relationship. The government argues that these resolutions should not be read in conjunction with the Supervisory Action Agreement because that Agreement only incorporates "interpretation[s]" and "understanding[s] agreed to in writing by the parties."

This reading of the integration clause, however, if not totally wooden, is directly at odds with the clause's plain language. The government ignores the "excepting" phrase of the clause and argues that all documents other than the Supervisory Action Agreement must, to be part of the parties' agreement, interpret an "understanding agreed to in writing by the parties." The "excepting" phrase, however, exempts both the Agreement of Merger and "any resolutions or letters issued contemporaneously" by FHLBB or FSLIC from such a qualification. These documents, as the language of the integration clause makes clear, are specifically excepted from the first phrase of the clause and need only be relevant to the

Agreement and the merger transaction to have meaning in regard to the contractual terms and intentions of the parties. The government thus cannot suggest that the integration clause *precludes* the court from considering these FHLBB resolutions and forbearance letters in construing the nature and terms of the contractual relationship between the government and Glendale.

The government also attempts to distinguish this case from *Winstar* by arguing that the forbearance letter in this case differs materially from the one found critical to determining the nature of the parties' agreement in *Winstar I*. The *Winstar* forbearance letter explicitly "confirmed" the parties' "understanding" in regard to the use of supervisory goodwill. *See Winstar I*, 21 Cl.Ct. at 115. The Glendale forbearance letter, by contrast, does not mention the use of supervisory goodwill. This fact alone, however, does not contradict the court's finding that an express contract existed in regard to the use of the purchase method of accounting. The court's ultimate finding in regard to the existence of a contract is based not only on the forbearance letter, but on the other contemporaneous documents flowing between the parties. As discussed above, these documents—the Supervisory Action Agreement, FHLBB Resolution 81-710, FHLBB Memorandum R 31b, the November 10, 1981 and March 19, 1982 Peat, Marwick, Mitchell & Co. opinion letters, and the November 19, 1981 letter from the Director of FSLIC, H. Brent Beesley to FHLBB—reflect the parties' express understanding regarding the use of supervisory goodwill amortized over twelve-year and forty-year periods of time. The forbearance letter merely confirms what is eminently clear from these

other documents: that FHLBB agreed to forbear from exercising its authority to bring enforcement proceedings against Glendale for failure to meet regulatory capital standards.

II. Contract Breach

A. *Statesman*

In *Statesman*, as in *Winstar*, the issue of contract breach is a relatively straightforward one. By enacting FIRREA, the government "altered existing regulations both to reduce the amount of supervisory goodwill includible in calculating core capital and to permit supervisory goodwill to be amortized for no more than twenty years." *Winstar II*, 25 Cl.Ct. at 549. As this court held in *Winstar II*, the act of altering the terms of the parties' original agreement, "absent a countervailing contractual right to do so," constituted a breach of contract entitling Statesman to damages or restitution. *Id.* at 550.

The government contends, however, for the first time in this two year-old litigation, that in this case, unlike in *Winstar*, the government possessed such a countervailing contractual right to alter the terms of the parties' original agreement.[9] The provision of the Assistance Agreement which accords the government this right, the government argues, is the so-called "unlawful inaction clause." The clause provides:

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[9] The government raised this argument for the first time in *Statesman* on June 12, 1992, in its Response to Plaintiffs' Status Report. In *Glendale*, the government first raised this argument in its October 15, 1990 Motion to Dismiss. To date, the government has not raised this argument in *Winstar*.

> This Agreement and the parties' rights and obligations under it shall be governed by the law of the State of Iowa, to the extent that Federal law does not control. *Nothing in this Agreement shall require any unlawful action or inaction by either party.*

Assistance Agreement at 96 (emphasis added). The government maintains that this clause unambiguously provided that, although the government agreed that Statesman could treat the $26 million capital credit and $25.8 million in supervisory goodwill as capital for purposes of satisfying minimum regulatory capital standards, the government made no commitment that Statesman could continue to do so if statute or regulation later provided to the contrary. The government argues that a failure by OTS to give effect to FIRREA's provisions would have constituted "unlawful inaction" on the government's part.

After examining both the language and location of the clause, however, the court must reject the government's interpretation of the "unlawful inaction clause." The clause, embedded within the Governing Law section of the Assistance Agreement, is a boilerplate clause which is contained within several of the Assistance Agreements at issue in the *Winstar*-related cases presently before this court, including *Winstar* itself. The fact that the government has made this argument in only one other case, *Glendale*, and only at this late juncture in *Statesman* certainly undermines the government's contention that this clause constituted a specially negotiated and unambiguous contractual right to alter the terms of the parties' original agreement. In the *Statesman* case alone, this identical clause is contained within the

four merger agreements by which Statesman acquired the four insolvent thrifts. In the drafting of those four documents, Statesman and the four insolvent thrifts had no concerns, as the government and Statesman did in the context of drafting the Assistance Agreement, about continuing obligations or executory terms that might be subject to a future change in law. It defies logic to suggest that the "unlawful inaction clause" has one meaning in the context of the four merger agreements and a different, and in this case dispositive, meaning in the context of the Assistance Agreement. Moreover, if this clause is given the meaning the government urges, the clause would contradict another provision of the Assistance Agreement providing that "[n]o amendment or modification of this Agreement shall be binding unless executed in writing by the parties or their successors." Assistance Agreement at 97. If the parties thus had agreed not to modify or vary the terms of the agreement without mutual consultation and bargain, it would flout reason to believe that the parties had also agreed to allow the government to retain the power to alter the terms of the agreement at will.

A narrower reading of the clause is more plausible and logical under the circumstances of this and other *Winstar*-related cases. The clause was designed to ensure that the contract would not be read to require a violation of any *then-existing* state or federal laws. No party in any *Winstar*-related case would contest the fact that the transactions at issue were complex and negotiated under severe time pressures. In this regard, the *Statesman* case is typical. The transaction involved four thrifts located in two states. The clause was undoubtedly included within the governing

law section of the assistance agreements as a protective measure to ensure that the parties had not inadvertently agreed to violate laws in effect at the time the parties contracted.

Moreover, to read the clause as the government suggests would require the court to view the agreement as an illusory bargain. If the clause in fact reserved to the government the right to cancel without liability its obligations should Congress or FHLBB in the future change the relevant statutory or regulatory scheme, then the contract could not be binding. Under such a contract, the government would in effect be agreeing to abide by its promises only so long as it unilaterally decided to keep those promises. A contract so construed would not be an enforceable contract. *See Flagship Fed. Sav. Bank v. Wall*, 748 F.Supp. 742, 748 (S.D.Cal.1990) (finding an agreement between the government and an acquiring savings and loan "illusory" because the government "had the right at any time to cancel its side of the bargain" without liability); *see also* 17 C.J.S. *Contracts* § 98 ("[A] promise, the performance of which depends on the mere option, will, inclination, or discretion of the promisor, as where the promisor is free to perform his promise or withdraw from the arrangement at his unrestricted pleasure, is merely illusory, and is insufficient consideration for the promise made by the other party."). The court will not read contracts, negotiated with care over many months as illusory, based upon a boilerplate clause. As the Supreme Court observed in quoting Alexander Hamilton, a contract with the government so construed would

> involve two contradictory things: an obligation to do, and a right not to do—an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.

Murray v. Charleston, 96 U.S. 432, 445, 24 L.Ed. 760 (1877).

Even assuming that the government considered reserving the right to unilaterally cancel its obligations without liability, the court points out that the government knew exactly how to make such a reservation when that was its intent. In *Guaranty Financial Services v. Ryan*, 928 F.2d 994, 999 (11th Cir.1991), the parties' agreement provided that "[a]ll references to regulations of the [FHLBB] or the FSLIC used in this Agreement shall include any successor regulation thereto, it being *expressly understood* that subsequent amendments to such regulations may be made and that *such amendments may increase or decrease the Acquiror's obligation under this Agreement*." (Emphasis supplied by the court). Similarly, in *Flagship Fed. Sav. Bank v. Wall*, 748 F.Supp. at 748, the forbearance letter expressly incorporated as part of the parties' agreement provided that "the FHLBB specifically reserves a right to cancel the forbearance at any time if it should find that the forbearance is unsafe or unsound or otherwise actually or potentially detrimental to Flagship." The government, therefore, knew how to reserve to itself the right to change the contract based on a change of law. The government in fact negotiated for that right in some cases.

The court accordingly finds that the government possessed no contractually-based right allowing it to abrogate without liability the parties' express contract. The government thus could not be immune from the consequences of its breach unless the enactment of FIRREA was found to be a sovereign act within the meaning of the sovereign acts doctrine. The court concluded in *Winstar II*, however, that FIRREA was not a sovereign act. *Winstar II*, 25 Cl.Ct. at 550-53. As the court noted, under the sovereign acts doctrine, "the government is not contractually liable, absent an express agreement to the contrary, for the consequences of acts performed in its sovereign capacity." *Id.* at 550. The doctrine, however, could not apply in that case, and by the same reasoning in the present cases, because

> taking away plaintiffs' rights in [§§ 1464(t)(3)(A) and (9)(B)] of FIRREA was not the necessary means to a broad public end, rather it was the government's end goal. On the government's reasoning, *any* statute breaching a contract would be immune under the doctrine merely because its purpose was to breach the contract. This court has never granted government immunity on such a basis . . . . Although the court accepts as given that the government sought to promote the public welfare in enacting FIRREA as a whole, those specific provisions of the Act altering the capital treatment of supervisory goodwill were intended to, and did, impact only upon plaintiffs and those similarly situated entities who had acquired savings and loan institutions. This fact compels the conclusion

> that sovereign act immunity cannot adhere in this and related cases.

Id. at 552 (emphasis in original). In enacting FIRREA, the government therefore became liable to plaintiff for damages or restitution.

In making this finding, the court notes that it is irrelevant for purposes of determining liability that the government's promise in this case included a capital credit. In *Winstar*, the government's consideration for the agreement only included its assent to the use of supervisory goodwill in satisfying regulatory capital requirements. Here, by contrast, the government agreed not only to allow the use of supervisory goodwill, it also promised to allow a capital credit of $26 million to Statesman. Although FIRREA is silent in regard to capital credits, the government has read FIRREA as disallowing their use in meeting minimum capital requirements. The court cannot find any reason for treating capital credits differently than supervisory goodwill: the government is liable to Statesman for its decision not to honor either of these promises.

B. *Glendale*

As in *Statesman*, the government hinges its contention that FIRREA does not constitute a breach on the "unlawful inaction clause" contained within the parties' Supervisory Action Agreement. The clause in this case, also embedded within the Governing Law section of the Agreement, contains the same language as the clause at issue in *Statesman*.

> This Agreement and the rights and obligations of the parties hereunder shall be governed by the law of the State of California, to the extent that

> Federal law does not control. *Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto.*

Supervisory Action Agreement at 15 (emphasis added).[10] The government's arguments regarding the meaning and effect of this clause mirror those put forward in *Statesman*. Thus for the reasons set forth in *Statesman* above, the court accordingly holds that the "unlawful inaction clause" in the parties' Agreement did not afford the government a contractually-based right allowing it to abrogate without liability the parties' express contract. The government, therefore, is liable to Glendale for damages or restitution.[11]

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[10] The Supervisory Action Agreement, as the one in *Statesman*, contained an express limitation on the ability of the parties to vary the terms of the original Agreement: "[n]o subsequent modification or termination of this Agreement shall be binding unless set forth in writing and executed by the parties or their proper successors." Supervisory Action Agreement at 15.

[11] In its Motion to Dismiss, the government argued that Glendale's claims for monetary damages were not ripe as Glendale admittedly met FIRREA's capital requirements at the time it filed its complaint. As of March 31, 1992, however, Glendale has fallen out of compliance with the "risk-based" capital standard set forth in FIRREA. (Glendale was $43 million short of meeting that standard as of March 31, 1992.) As a result, Glendale was required to submit to OTS on June 1, 1992, a capital restoration plan for returning Glendale to capital compliance. A failure by Glendale to comply with that plan subjects it to regulatory sanctions, including seizure. *See* 12 U.S.C. § 1464(t)(6). As noted above, FIRREA has also caused Glendale to suffer monetary loss. Without the inclusion of supervisory goodwill in calculating its capital amounts,

III. *Transohio Savings Bank v. Director, Office of Thrift Supervision*

In these and all other *Winstar*-related cases, the government has interpreted the Supreme Court's ruling in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (POSSE), to mandate that a contract cannot exist between the plaintiffs and the government. In support of this position, the government has invoked the United States Court of Appeals for the District of Columbia Circuit's recent decision in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C.Cir.1992). In that decision, the court affirmed the district court's denial of a preliminary injunction sought by an acquiring savings and loan similarly situated to Winstar, Statesman and Glendale. The injunction, if granted, would have enjoined OTS from enforcing those provisions of FIRREA disallowing and reducing the use of supervisory goodwill in the context of regulatory mergers.[12] Although the

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Glendale has been forced to: implement costly measures to compensate for the loss of goodwill; constrain capital resources; and lose business opportunities and investor confidence. Glendale, therefore, has suffered an injury sufficiently ripe for adjudication in this court.

[12] All four United States Courts of Appeals which have reviewed preliminary injunction motions seeking to enjoin OTS have ruled against such motions. *See Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 963 F.2d 567 (3d Cir.1992); *Far West Fed. Bank v. Director, Office of Thrift Supervision*, 951 F.2d 1093 (9th Cir.1991); *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994 (11th Cir.1991); *Franklin Fed. Sav. Bank v.*

Transohio court explicitly acknowledged that the district court did not have jurisdiction over the acquiring thrifts "pure contract claims," *see Transohio*, at 601 ("We find . . . that the district court did not have jurisdiction over Transohio's pure contract claims because only the Tucker Act, 28 U.S.C. § 1491(a)(1), waives sovereign immunity for Transohio's contract claims, and the Tucker Act provides for jurisdiction in the Claims Court alone."), the court considered the merits of the plaintiff's contract arguments in evaluating the acquiring thrifts' statutory and due process claims. *Id.* In reaching the merits, the *Transohio* court upheld, and in some respects expanded upon, the position taken by the government on the teaching of POSSE in the present litigation, a position obviously at odds with the conclusions reached by this court in *Winstar II*. *See Winstar II*, 25 Cl.Ct. at 545 ("[T]he [Supreme] Court's holding in POSSE in no way precludes this court from finding the existence of a contract between the government and plaintiffs. As is evident from its opinion, the Court in POSSE recognized that the government has the power to enter into contracts which confer vested rights—rights which the government has a duty to honor."). As the parties here have argued the *Transohio* decision in their briefs, it is therefore this court's duty to consider its reasoning. While this court is only bound by the United States Court of Appeals for the Federal Circuit's precedent (and of course that of the Supreme Court), it certainly

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Director, Office of Thrift Supervision, 927 F.2d 1332 (6th Cir.), *cert. denied*,—U.S.—, 112 S.Ct. 370, 116 L.Ed.2d 322 (1991).

gives due consideration to the views of other courts when not inconsistent with our circuit.

A. The Issues

In reviewing the district court's denial of a motion for a preliminary injunction filed by the acquiring thrift, the *Transohio* court recognized that a contract existed between the acquiring thrift, Transohio Savings, and the government. *Transohio*, at 618 ("We agree with Transohio [Savings] . . . that the circumstances of the mergers support a finding that the transaction reflected a voluntary bargain, the terms of which were freely negotiated by the parties and binding on them."). Having recognized the existence of a contract, the court proceeded to address two issues raised in the present litigation: (1) whether, in light of the POSSE decision, that contract was one which could bind Congress' power to regulate and (2) whether FHLBB and FSLIC possessed the power to enter into such a contract. *Id.* at 617. After examining the terms of the parties' contract and the statutory language delegating contracting authority to FHLBB and FSLIC, the court found that the answer to the above framed issues was "no." *Id.* at 620, 624. This court addresses these issues and the *Transohio* court's analysis of them in turn.

B. "Alleged Power of Agency to Bind Congress"

The *Transohio* analysis of plaintiffs' contract claims offers a novel conception of government structure which is inconsistent with how this court has historically viewed the creation of rights in our constitutional system. Whether an agency has the power to bind Congress is a false issue in all of the *Winstar* cases. Under our constitutional structure, each branch of government has its respective role and

each is equally bound by the Constitution and the laws established by the constitutional process. *See I.N.S. v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."). All agencies of the executive branch, other than the President, are established by the Congress, with certain powers and certain duties. By exercising these powers and fulfilling these duties an agency immediately and continuously creates legal effects on private rights. This exercise of power in no way "binds" Congress as a legislative body. It can, however, and continuously does, create rights on the part of private individuals that are held against and restrict government action. Once a salary check is paid, a surplus auto sold, a grant finally delivered, a license issued, a promotion secured, a contract let, or a title transferred, a legal right is created that under the Constitution binds the government. That property right cannot be taken away or diminished by the government without process of law, and in many cases even with process of law, it is immune to recapture. To suggest, then, that an agency action cannot confer rights which the government must honor is to suggest a notion that is as novel as it is anathema to our constitutional system. The power of Congress to legislate is no more bound by the contracts in these cases than it is by the sale of a piece of land by an agency that was authorized by Congress to sell that land. Once the land or action has been taken, Congress cannot return, absent a common law legal right

to do so, to the pre-existing legal condition. Once the land is sold or the right granted there is a new legal reality.

On this point, James Madison observed:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

THE FEDERALIST No. 48 (James Madison).

In the present cases, as in *Transohio*, what the acquiring thrifts were in fact required to show was that FHLBB and FSLIC unmistakably contracted with them regarding the use of supervisory goodwill and, in some cases, the use of capital credit. This court, as the *Transohio* court, has found that the rights the acquiring thrifts rely on for recovery "were freely negotiated by the parties and binding on them." *Transohio*, at 618. As the *Transohio* court made clear, "[t]he agencies had no power to compel Transohio to purchase the insolvent thrifts; nor do the banking regulators' promises to Transohio

amount to a mere benefit bestowed on the thrift by the largesse of the government." *Id.* The rights at issue here are thus akin to those at issue in *Perry* and *Lynch*. In exchange for legally binding consideration, the government entered into unmistakable contracts conferring vested rights.

In recognizing that binding contractual rights were created and that those rights must be honored, the court stresses what the contrary conclusion entails. The *Transohio* court interpreted the contract between the government and the acquiring thrifts as embodying nothing more than a gamble: "[W]e interpret the contract provisions at issue to mean that the agencies would allow [the acquiring thrift] to treat supervisory goodwill as regulatory capital only as long as the regulatory regime permitted the agencies to do so." *Transohio*, at 620; *see also Guaranty*, 928 F.2d at 999 ("By signing the contract, [the acquiring thrift] took that chance, in effect wagering the chance that the rules would be changed against the potential return if they were not."). Such an interpretation runs counter to the purpose behind the establishment and continued existence of this court. The Claims Court and its predecessor, the Court of Claims, was formed with the purpose of instilling confidence in dealing with the federal government that the government would honor its obligations to its citizens. The court was thus conceived pursuant to the idea, eloquently expressed by President Abraham Lincoln, that "[i]t is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals." W. Cowen, P. Nichols, Jr. and M. Bennett, *The United States Court of Claims: A History*, *reprinted in* 216

Ct.Cl. 1, 20-21 (1978) (quoting 62 Cong. Globe, 37th Cong., 2d Sess., App. at 2 (1862) (President Lincoln's 1861 Annual Message to Congress) (emphasis omitted)). To conclude that all dealings with the government constitute nothing more than "a very elaborate and expensive form of gambling," *Winstar II*, 25 Cl.Ct. at 548, is thus at variance with the very ideal upon which this court, the Tucker Act, and ultimately the rule of law is based.

C. *The Unmistakability Doctrine*

In determining whether the contract between the government and Transohio Savings could bind Congress' power to regulate, the *Transohio* court looked to the language of the parties' agreement. The *Transohio* court proceeded from the assumption that " 'one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms.' " *Transohio*, at 618 (quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C.Cir.), *cert. denied*,—U.S.—, 111 S.Ct. 47, 112 L.Ed.2d 24 (1990)). The court labelled this principle the "unmistakability doctrine," a "special rule of contract interpretation that applies to contracts with the government." *Transohio*, at 619. Examining the language of the parties' contract, the court concluded that there was "no unmistakable waiver of Congress' regulatory power" and that therefore the government was free to enact FIRREA and breach the parties' contract without liability. *Id.* at 620.

In so construing the unmistakability principle, the *Transohio* court severed the doctrine from its historic moorings. The doctrine has stood for the

proposition that any obligation to a private party on the part of the government cannot be implied or presumed, but must be "expressed in terms too plain to be mistaken." *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446, 17 L.Ed. 173 (1861). In the Contract Clause[13] cases from which the doctrine arose, it was consistently held to mean that courts must strictly construe contract terms to ensure that any sovereign power of the state, specifically its power to tax, is not constrained without an express intention by the state to bind itself. *See, e.g.*, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561-63, 7 L.Ed. 939 (1830) ("That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. As the whole community is interested in retaining it undiminished; that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear."); *Keefe v. Clark*, 322 U.S. 393, 396-97, 64 S.Ct. 1072, 1073-74, 88 L.Ed. 1346 (1944) ("Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation [to not levy a tax in the future] alleged to

[13] The Contract Clause of the Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10. The Clause has been understood as "limit[ing] the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515, 52 L.Ed.2d 92 (1977).

have been impaired be clearly and unequivocally expressed . . . . 'The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation,' "(quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548, 9 L.Ed. 773 (1837))). In other words, courts must examine whether, *in regard to the sovereign power alleged to be constrained*, "[a]ll the basic elements of contract formation [are] present: capacity and mutual intent to contract, arms length negotiation, and the exchange of real obligations for real benefits." *Winstar II*, 25 Cl.Ct. at 547.

The purpose of the doctrine in the context of the Contract Clause was obviously to safeguard the sovereign power of states. The Court recognized that a state's ability to exercise its sovereign powers is so important to the welfare of the general public that any limitation on that ability must be expressed in clear and explicit terms. The Court, however, never held that states could not be bound when they entered into unmistakable contracts. In *Jefferson Branch Bank*, for example, the Court considered whether a bank's state-granted charter created a contract right exempting the bank from taxation imposed by a subsequent statute. In holding that the bank possessed such a right, the court invoked the unmistakability doctrine's historic purpose:

> [T]he vital importance of a State's right to tax was considered, and the relinquishment of it by a State has never been presumed. That language of the court has always been cautious, and affirmative of the right of the State to impose taxes, unless it has relinquished by unmistakable

> words, clearly indicating the intention of the State to do so. *This court has always said and acted upon it: We will not say that a State may not relinquish its right to tax in particular cases*, or that a consideration sufficiently valuable to induce a partial increase of it may not exist, but as the whole community is interested in preserving it undiminished, it has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear.

Id. 66 U.S. (1 Black) at 447, 17 L.Ed. at 179 (emphasis added).

The purpose animating the unmistakability doctrine makes it clear that the doctrine controls how contractual rights with the government are *created*, *i.e.* whether the government has agreed in unmistakable terms to be contractually bound. The doctrine never has been understood as controlling, as the government has alleged in the *Winstar*-related cases, the effect of the government's breach of a contract. *See United States Trust Co. v. New Jersey*, 431 U.S. at 23, 97 S.Ct. at 1518 ("Th[e] [unmistakability] doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment."). The doctrine solely goes to whether a party possesses contractual rights which are binding and for which damages may be given.

Thus, in *Winstar* and the instant cases, there has been little serious dispute that the government granted the acquiring thrifts, in the clearest possible terms, the right to certain types of regulatory capital

treatment. Likewise, the acquiring thrifts have never contended in this court that the government is bound to specifically perform on this obligation. Rather, the dispute has primarily raged over the question of breach. Namely, whether the government must pay damages or provide restitution for its breach, or whether it is excused from such damages by an interpretation of POSSE or the sovereign acts doctrine. The historical understanding of the unmistakability doctrine is not applicable to this issue.

This court's understanding of the unmistakability doctrine is thus at odds with the *Transohio* court's analysis. The *Transohio* court held that the government always possesses the power to amend its laws (even if in exercising that power the government alters the terms of an agreement with a private individual) *except* where the private individual has secured in unmistakable terms the government's promise to waive that power in the future. *Transohio*, at 618. In other words, the government has the power to breach a contract with a private individual unless it unambiguously waives that right to breach in the contract itself. This analysis fails to recognize that the "unmistakability" requirement relates to the nature of an agreement between the government and a private individual, *i.e.* whether it is contractual or not. This is also the teaching of POSSE. If an agreement of the government to forbear from the exercise of one of its sovereign powers is unmistakably found to be a term of a contract with a private individual, then the government cannot breach the contract without liability. *See Sinking-Fund Cases*, 99 U.S. 700, 719, 25 L.Ed. 496, 504 (1878) ("The United States are as much bound by their contracts

as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.").

The Supreme Court has never interpreted the unmistakability doctrine as requiring an explicit reference in the contract to the waiver of Congress' power to legislate in the future. In *Perry*, for example, the Court found a binding contractual obligation on the part of the government, which could not be altered by subsequent legislation, even though the bond forming the basis of the parties' agreement never referred to Congress' power to legislate. The government's obligation as expressed in the bond merely provided that "[t]he principal and interest hereof are payable in United States gold coin of the present standard of value." *Perry*, 294 U.S. at 347, 55 S.Ct. at 433; Act of September 24, 1917, ch. 56, 40 Stat. 288 (1917). No words in the bond referred explicitly to the fact that the government had bound Congress' power to alter the terms of the bond in the future. *See also Lynch*, 292 U.S. at 577-79, 54 S.Ct. at 842-44 (finding that Congress could not abrogate without paying compensation a contract to provide war risk insurance where the statute constituting the contract, Act of October 6, 1917, ch. 105, Sec. 402, 40 Stat. 409 (1917), made no reference to Congress' power to legislate); *United States Trust Co. v. New Jersey*, 431 U.S. at 9-10, 97 S.Ct. at 1511-12 (finding that New Jersey and New York could not abrogate the terms of bonds held by private individuals where the statute defining the terms of the bonds did not mention the power of either state to legislate). To read the unmistakability doctrine as requiring explicit reference to Congress' sovereign power in the contract is to exalt the words of a contract over the substance of an unmistakable bargain struck between the government and its citizens.

D. *Statutory Delegation and the Unmistakability Doctrine*

In determining whether FHLBB and FSLIC possessed the power to enter into a contract which could "bind" Congress' power to regulate, the court applied its interpretation of the unmistakability doctrine to statutory delegations of power to executive branch agencies. The court ruled that

> [i]n the context of contracts entered into by administrative agencies . . . the unmistakability doctrine has two components: the contract relinquishes Congress' power to regulate only when (1) the agency, in the contract, has unmistakably waived Congress' regulatory authority, and *(2) Congress, in a statute, has unmistakably delegated to the agency the power to surrender Congress' regulatory authority.*

Transohio, at 621 (emphasis added). The court reasoned that the only alternative to requiring an unmistakable delegation by Congress to agencies concerning Congress' regulatory authority would be "reading broad congressional delegations of power as including the power to preclude future congressional regulatory legislation," an alternative which "would seriously undermine the constitutional scheme of separation of powers." *Id.* at 622. The *Transohio* court conjectured that such broad delegations would erode the separation of powers between the executive and legislative branches because they "would allow

federal agencies to supplant congressional policy-making by contracting away Congress' power to legislate." *Id.*

This analysis, however, must be rejected because of its assumption that the acquiring thrifts in these cases claim to have bound Congress' power to regulate. They make no such claim. The acquiring thrifts merely assert that they entered into unmistakable contracts with the government regarding the treatment of supervisory goodwill. As this court ruled in *Winstar II*,

> the government's power to regulate must operate within the context of plaintiffs' contract rights. While Congress clearly may alter the regulatory treatment of supervisory goodwill, it must also honor the plaintiffs' rights. The government may breach the contract, but it must pay for the damages the plaintiffs suffer. Any alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights.

Winstar II, 25 Cl.Ct. at 549. In extending an unmistakability requirement to the statutory delegation of authority to FHLBB and FSLIC, the *Transohio* analysis creates new law at odds with historic contract interpretation.

FSLIC's clear statutory mandate also belies the conclusion that only explicit delegations surrendering Congress' power to regulate can create real rights. FSLIC was given broad authority *by Congress* to assist and participate in acquisitions of unhealthy or insolvent thrifts by healthy and solvent ones.

> In order to facilitate a merger or consolidation of an insured institution . . . with another insured institution or the sale of assets of such insured institution and the assumption of such insured institution's liabilities by another insured institution, [FSLIC] is authorized, *in its sole discretion and upon such terms and conditions as [FSLIC] may prescribe*—
>
> . . . . .
>
> (iii) to guarantee such other insured institution . . . against loss by reason of such other insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution . . . .

12 U.S.C. § 1729(f)(2)(A) (emphasis added). This statutory delegation, in conjunction with FSLIC's congressionally authorized power to enter contracts, *see* 12 U.S.C. § 1725(c)(3) (FSLIC "shall have power . . . to make contracts"), makes it clear that FSLIC possessed the power to enter into binding agreements with acquiring savings and loan institutions. The *Transohio* court's expressed concern that if FSLIC indeed had the authority to enter into contracts with acquiring thrifts that "agencies would be making laws not pursuant to congressional direction, but over Congress' objections" is therefore unpersuasive. It is also a concern that the Congress obviously rejected when it authorized FSLIC to enter into these transactions and execute these contracts. It is hardly the function of courts to provide Congress advice on the political dangers of delegating legal authority to federal agencies. In according FSLIC the authority to contract, Congress made a policy decision to give FSLIC the power to bind the government. FSLIC,

therefore, cannot be held to have exceeded its authority because it possessed, by an act of Congress, the power to bind the government and thereby confer vested contractual rights.

Perhaps at the core of this court's difficulty with accepting *Transohio*'s reasoning is that decision's conception of government structure. Congress under our system makes law, it does not deal with an executive agency as if that agency was under its bureaucratic direction. The teaching of *Chadha* makes it clear that the Congress operates only by legislating, not by administering. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 466, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) ("[T]he principal function for the legislature is not to make contracts, but to make laws that establish the policy of the state.").

Just as agencies cannot be thought of as common law agents of the Congress under our constitutional system, they cannot bind Congress as an agent may sometimes bind its principal. The government is always and continuously bound by the legal effects of all previous legislation as well as the Constitution. The very concept of Congress contracting away some of its sovereign power as the *Transohio* court suggests—" We assume without expressing a view that Congress might, in a contract, surrender aspects of its regulatory authority—though the Supreme Court has recently said that a *state* may not contract away 'essential' attribute[s] of its sovereignty,' *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977), and long ago suggested that Congress may not either, *see North Am. Commercial Co. v. United States*, 171 U.S. 110, 137, 18 S.Ct. 817, 828, 43 L.Ed. 98 (1898)," *Transohio*

at 621—is so strange precisely because Congress does not act as Congress through contracting. Only in Congress' internal housekeeping does it act by contracting. In this capacity it acts not as one of the branches of the triune sovereign, but as another government agency. Any theory to the contrary diminishes the role of Congress in our government by turning it into a part of the bureaucratic system rather than as the repository of "[a]ll legislative Powers herein granted . . . ." U.S. CONST. art. I, § 1.

E. *Congressional Policy*

In reaching its conclusion that the agreements between the government and the acquiring thrifts constituted nothing more than gambling transactions, the *Transohio* court invoked as support policy statements criticizing the use of supervisory goodwill made by members of Congress and the Administration. *Transohio*, at 619-20. The government has also invoked such policy statements in arguing that the government cannot be bound by these agreements. This court again seeks to make it clear that *policy considerations have no part* in evaluating whether the acquiring thrifts possessed contractual rights which must be honored. As this court noted in *Winstar II*:

> The duty of this court, like any other court, is solely limited to determining the respective rights of the particular parties before it and granting relief to the parties where appropriate. It would be highly improper for this court to consider, as the government seems to suggest it do, the effect of this decision on the government's savings and loan policy. Courts are not established to make policy. Our Constitution, and

the people who established that great document, gave the policy-making powers to the executive and legislative branches.

Winstar II, 25, Cl.Ct. at 550.

IV. *Consolidation and Certification for Interlocutory Appeal*

Winstar was the first of eighteen cases filed to date in the Claims Court which require a determination of the legal impact of FIRREA on the claimed contract rights of acquiring thrifts. In each of the remaining fifteen cases, the court is called upon to consider, as it has done in *Winstar* and again in the present cases, the nature and effect of pre-FIRREA negotiated agreements between acquiring thrifts and the government. Although some of the remaining cases present issues not addressed in *Winstar*, *Statesman* or *Glendale*, the outcome of all the *Winstar*-related cases will be settled in favor of the government if this court has incorrectly ruled in *Winstar*, *Statesman*, and *Glendale* that (1) the Supreme Court's decision in *POSSE* does not affect the binding nature of the agreements entered into between the government and the acquiring thrifts and (2) FIRREA does not constitute a sovereign act within the meaning of the sovereign acts doctrine.

Based on the fact that this court's conclusions on these two legal issues affect eighteen very large and complex cases, this court raised with the parties in *Winstar*, *Statesman*, and *Glendale* at a status conference on May 4, 1992 the possibility that an interlocutory appeal might be the appropriate means by which potentially to prevent the wasting of considerable resources, not only of the court, but of

the parties in those three cases and the remaining fifteen cases before the court. The court suggested that the *Winstar*, *Statesman*, and *Glendale* cases be the cases taken up on appeal because, considered together, they present a number of different factual variations on the legal issues that must ultimately be decided. In regard to the agreements alleged to constitute a contract, *Statesman* involves an express contract which the government has conceded it entered into (at least in regard to capital credit); *Glendale* involves an express contract which the government does not concede it entered into; and *Winstar* involves an implied-in-fact contract. In regard to the effect of FIRREA on the acquiring thrifts, *Glendale* involves a thrift which, even after FIRREA, is solvent and in operation; *Statesman* involves an insolvent thrift that, but for FIRREA, would be solvent; and *Winstar* involves an insolvent thrift which would still most likely be insolvent even if FIRREA had not been enacted. Further, these are the only three cases which have reached the stage of a final determination of liability.

After resolving the liability stages of *Statesman* and *Glendale* today, the court finds that it is appropriate, and indeed the court's duty, to make it possible for the parties in *Winstar*, *Statesman*, and *Glendale* to seek an interlocutory appeal before the *United States Court* of Appeals for the Federal Circuit. To that end, the court hereby orders:

(1) *Statesman* and *Glendale* are consolidated with *Winstar Corp. v. United States*, No. 90-8C. The cases will be captioned under the case name *Winstar Corp. v. United States*;

(2) Pursuant to 28 U.S.C. § 1292(b), the court hereby certifies that this court's opinions granting summary judgment as to liability in the consolidated cases *Winstar Corp. v. United States*, No. 90-8C, *Statesman Savings Holding Corp. v. United States*, No. 90-773C, and *Glendale Federal Bank, FSB v. United States*, No. 772C, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these opinions may materially advance the ultimate termination of this and related litigation.

CONCLUSION

For the reasons set forth above, the court grants Statesman's and Glendale's Motions for Summary Judgment as to Liability. The court also denies the government's pending Motions to Dismiss in both cases. If the parties do not seek an interlocutory appeal, these cases will move forward to determine plaintiffs' injury, if any, and the appropriate measure of damages or manner of restitution.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 90-8C

WINSTAR CORPORATION AND UNITED FEDERAL SAVINGS BANK, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[Filed April 21, 1992]

OPINION

SMITH, Chief Judge.

In its order of February 21, 1992, 25 Cl.Ct. 147, the court granted in part defendant's Motion for Clarification of the Issues Remaining to be Briefed Respecting the Government's Alleged Contract Breach in order to clarify certain outstanding issues in this and related cases. This opinion elaborates upon the court's February 21 order.

FACTS[1]

This case involves Congress' passage of the Financial Institutions Reform, Recovery, and En-

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[1] The factual background of the case is more fully set forth in the court's opinion of July 27, 1990, *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990).

forcement Act of 1989 (FIRREA)[2] and the effect of that Act on plaintiffs' 1984 acquisition of a failing savings and loan institution. Plaintiffs acquired the failing savings and loan, Windom Federal Savings & Loan Association, pursuant to a negotiated agreement with the Federal Home Loan Bank Board (FHLBB) and the Federal Savings and Loan Insurance Corporation (FSLIC). The linchpin of the parties' agreement was the government's assent to allow plaintiffs to employ the purchase method of accounting for the purposes of satisfying regulatory minimum capital requirements. As the court noted in its earlier decision, "the promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction." *Winstar*, 21 Cl.Ct. at 115. Under this purchase method of accounting,

> the book value of the acquired savings and loans' assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." In other words, the government agreed to allow the plaintiffs and others in similar circumstances to treat what was a deficit in capital as an asset. Goodwill was considered an intangible asset that could be amortized on a straight-line basis over a number of years. The difference between the aggregate fair market value of the failing thrift's assets was known as "supervisory goodwill," in the context of a supervisory merger, and was recorded on the resulting institution's balance sheet as an asset includable in capital for purposes of satisfying FHLBB's minimum capital requirements.

Id. at 113. The terms of the final agreement accepted by the government provided for a thirty-five year period for the amortization of this supervisory goodwill asset.

The passage of FIRREA in 1989, however, altered the arrangement struck between plaintiffs and the government. The new law provided that supervisory goodwill could be amortized over a period of no more than twenty years, and provided that the amount of goodwill included could not exceed a specified percentage of the savings and loan's assets.[3] Plaintiffs subsequently filed a complaint in this court on January 1, 1990, alleging that the exclusion under FIRREA of at least some of plaintiffs' supervisory

[2] Pub. L. 101-73, 103 Stat. 183 (Aug. 9, 1989). FIRREA is codified at various sections of Title 12 of the United States Code.

[3] The applicable sections of FIRREA provided that certain savings and loan institutions could "include qualifying supervisory goodwill in calculating core capital." 12 U.S.C. § 1464(t)(3)(A) (Supp.1991). "Qualifying supervisory goodwill" was defined by the statute as "supervisory goodwill existing on April 12, 1989, amortized on a straight-line basis over the shorter of—(i) 20 years, or (ii) the remaining period for amortization in effect on April 12, 1989." 12 U.S.C. § 1464(t)(9)(B) (Supp. 1991); *see Winstar*, 21 Cl.Ct. at 114. In plaintiffs' case, the shorter period for allowable amortization was the twenty year period.

goodwill constituted a breach of contract and, alternatively, a taking of plaintiffs' contract rights.[4]

On March 28, 1990, the government filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. In its motion, the government contended that no contractual relationship existed between the parties. Relying primarily on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*), the government also argued that plaintiffs' claim, if granted, would have the effect of improperly binding the government's power to regulate. On March 30, 1990, plaintiffs filed a Motion for Summary Judgment as to Liability. After entertaining the arguments proffered by the parties in their briefs and at oral argument, the court ruled on July 27, 1990 that an implied-in-fact contract existed between the parties. *Winstar*, 21 Cl.Ct. at 116-17. The court, however, stopped short of granting plaintiffs' motion for summary judgment, indicating that further briefing would be necessary on the following issues: whether a breach occurred; if so, whether it resulted in injury; and if so, the type and measure of relief appropriate. *Id.* at 117.

In August 1990, the government filed a Motion for Clarification of the Issues Remaining to be Briefed Respecting the Government's Alleged Contract Breach. Following that motion the court heard oral

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[4] The court does not reach the merits of plaintiffs' taking claim at this juncture. *See Sun Oil Co. v. United States*, 572 F.2d 786, 215 Ct.Cl. 716, 769 (1978) (where a plaintiff presents alternative theories of recovery based on contract and fifth amendment taking rights, recovery on one theory precludes recovery on the other).

argument in a number of other cases on similar and related claims.[5] This opinion and the court's order of February 21, 1992 constitute the court's disposition of the government's Motion for Clarification. As of May 24, 1990, the date of oral argument, plaintiffs' bank had been placed into receivership.

DISCUSSION

I. The existence of a contract

In its Motion for Clarification, the government reiterates its position that, absent an expressed contract right granting plaintiffs an exemption from future legislation regarding the capital treatment of goodwill, plaintiffs' contract breach claim must fail. In support of its position, the government relies on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*). In *POSSE*, the state of California and employees of several of its public agencies brought suit against the Secretary of the Department of Health and Human Services to prevent implementation of a 1983 amendment to the Social Security Act. The amendment, if implemented, would revoke states' then-existing "right" to withdraw their participation in the social security system.

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[5] Oral argument was held on plaintiffs' motions for summary judgment and the government's motions to dismiss in *Statesman Savings Holding Corp. v. United States*, No. 90-773C (February 8, 1991) and *Barron Bancshares, Inc. v. United States*, No. 90-830C (May 30, 1991). Oral argument was held on the government's motions to dismiss in *Glendale Federal Bank, FSB v. United States*, No. 90-772C (February 28, 1991), *Hometown Financial, Inc. v. United States*, No. 90-843C (April 4, 1991), and *Suess v. United States*, No. 90-981C (June 6, 1991).

Since the inception of the social security system in 1935, every state, including California, had voluntarily participated in the program. California, and the other plaintiffs, argued that the original Act under which they and other states had participated had created an independent contractual right to withdraw from the system. This withdrawal right, the plaintiffs contended, constituted a protected property interest under the fifth amendment. This property interest, they asserted, was insulated from the reach of another statutory provision in the original Act granting Congress "the right to alter, amend, or repeal any provision" of the Act, 42 U.S.C. § 1304. In enacting the 1983 amendment cancelling that withdrawal right, the plaintiffs argued, the government had taken plaintiffs' protected property interests in violation of the fifth amendment.[6]

The Supreme Court, however, rejected plaintiffs' claim. Emphasizing the inclusion of the "alter, amend or repeal" power granted in the original Act, the Court held that Congress possessed the power to implement the contested amendment. In so holding, the Court sought to clarify the nature of contractual relationships where the government is a party.

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, *see Perry v. United States*, 294 U.S. 330, 350-354 [55 S.Ct. 432, 434-36, 79 L.Ed. 912] (1935); *Lynch v. United States*, 292 U.S. 571 [54 S.Ct. 840, 78 L.Ed. 1434] (1934), we have declined in the

[6] The fifth amendment provides that "nor shall private property be taken for public use without just compensation." U.S. CONST., amendment V.

> context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 [102 S.Ct. 894, 907, 71 L.Ed.2d 21] (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those to which a sovereign itself is a party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147 [102 S.Ct. at 907].

POSSE, 477 U.S. at 52, 106 S.Ct. at 2396-97. Underscoring these tenets of contract interpretation, the Court noted its "often-repeated admonition [ ] that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Id.* at 53, 106 S.Ct. at 2397.

Contrary to the assertions of the government, the Court's holding in POSSE in no way precludes this court from finding the existence of a contract between the government and plaintiffs. As is evident from its opinion, the Court in *POSSE* recognized that the government has the power to enter into contracts which confer vested rights—rights which the government has a duty to honor. *See Perry v. United States*, 294 U.S. 330, 351, 55 S.Ct. 432, 435, 79 L.Ed. 912 (1935) ("To say that the Congress may withdraw or ignore [its] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other

sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."); *Lynch v. United States*, 292 U.S. 571, 580, 54 S.Ct. 840, 844, 78 L.Ed. 1434 (1934) ("Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").[7]

In *POSSE*, however, unlike the case here, no such vested rights were created as the basic elements of contract formation were absent. In contracts involving the government, as with all contractual relationships, rights vest and contract terms become binding when, after arm's length negotiation, all parties to

[7] The court rejects the government's argument that the *Perry* and *Lynch* decisions are not controlling in this case because the obligation owed by the government in those cases was purely a financial one whereas the obligation owed here is a duty to treat an intangible asset in a certain way. The court does not detect a legally significant distinction between a contract such as the one at issue in *Perry* wherein the government borrowed money from a private party and in return was obligated to pay that money back with interest and a contract like the one at issue here wherein the government asks a private party to engage in a certain activity (*e.g.*, build an airport or purchase an insolvent savings and loan) in exchange for money or some equivalent consideration upon which a fixed value can be placed. In both contractual situations, the legal consideration exchanged can be put in monetary terms and thus damages for breaching the contract can be fixed in monetary terms. Therefore, in this case, as was the case in *Perry* and *Lynch*, the government can be held liable for monetary damages.

the contract agree to exchange real obligations for real benefits.[8] In *POSSE*, the Court determined that such vested contract rights did not exist. *POSSE*, 477 U.S. at 52, 54-55, 106 S.Ct. at 2396, 2397-98. Although the Court did not explicitly so state, the facts of *POSSE* make it clear that the provisions of the original Social Security Act were not promulgated after negotiation, arm's length or otherwise, between Congress and the plaintiffs who filed suit. As is the case with all legislation, the only "negotiations" or bargaining involved in the enactment of the

[8] The validity of all contracts to which the government is a party also depends on a finding that the government representative whose conduct is relied upon possessed actual authority to bind the government. *See El Centro v. United States*, 922 F.2d 816 (Fed.Cir.1990), *cert. denied*,—U.S.—, 111 S.Ct. 2851, 115 L.Ed.2d 1019 (1991). In the instant case, the government concedes that the relevant FHLBB and FSLIC officials possessed such authority. See transcript of oral argument, May 24, 1990, at 86, 94; *see also* 12 U.S.C. § 1729(f) (1989) (FSLIC "is authorized, in its sole discretion and upon such terms and conditions as [it] may prescribe" to extend assistance to failing thrifts).

The sole authority issue raised by the government is whether the relevant FHLBB and FSLIC officials possessed authority to bind Congress from enacting subsequent legislation disrupting the terms of the contract entered into with plaintiffs concerning the capital treatment of supervisory goodwill. *See* Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment at 31-33. The court does not understand this as the true issue raised by this and related cases. The court views this issue as encompassed in defendant's contention that in light of *POSSE* no contract rights exist. The court has been presented with no evidence or argument that FHLBB or FSLIC did not have proper authority in their statutory mandates to engage in the type of or specific transaction involved in this or similar cases.

original Social Security Act and its amendments took place in the halls of Congress. The "rights" at issue in *POSSE*, then, were solely government-created. They were really policy decisions made by the democratic political process. There was no legal consideration for the creation of these "rights." At any time, the government could revoke them *without legal consequence* because the plaintiffs had not bargained for their creation. *See Estate of Samuel E. Bogley v. United States*, 514 F.2d 1027, 206 Ct.Cl. 695, 704-05 (1975) ("It is fundamental that in order to have a valid contract one party must make an offer that is a promise which is conditional upon receipt by the offeror of some act or promise from the offeree, and the offer must be accepted as to all its terms by the offeree."); RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) ("To constitute consideration, a performance or a return promise must be bargained for."); 17 C.J.S. Contracts § 34 (Every contract "is the result of, and springs from, an offer and the acceptance thereof. The offer and acceptance must have the characteristics of a bargain and must be conventional counterparts . . . .").[9]

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[9] A similar legal issue was presented in *Orrego v. United States Department of Housing and Urban Development (HUD)*, 701 F.Supp. 1384 (N.D.Ill.1988), *rev'd on other grounds sub nom., Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir.1991). In that case, tenants of a federally assisted moderate and low income apartment building challenged an attempt by the building's private owner to end federal regulation of the apartment. Specifically, the tenants challenged the prepayment by the owner to the Department of Housing and Urban Development (HUD) of the remaining amount due on its federally insured mortgage. The issue in dispute was the nature of the owner's "rights" under the regulatory agreement it entered into with the government. Under the regulatory scheme in effect at the time the owner entered into its agreement, private developers were eligible to "contract" with a government agency which would purchase existing mortgages and give the developers below-market forty-year mortgages on the condition, among others, that they would be limited in the rents they could charge tenants. *See* 12 U.S.C. § 1715l(d)(3). In the standard regulatory agreement at the time the owner in *Orrego* "contracted" with the government, owners were permitted to prepay their mortgages after twenty years. *See* 24 C.F.R. § 221.524(a)(ii). Many owners sought to do this in order to end federal regulation and thereby obtain higher market-fixed rents. *Orrego*, 701 F.Supp. at 1387. However, anticipating a decrease in the availability of low income housing because of the prepayment provision, Congress enacted an amendment to 12 U.S.C. § 1715*l*(d)(3) which eliminated the owners' then-existing "rights" to prepay their mortgages. In *Orrego*, the tenants challenged the owner's post-amendment prepayment, arguing that it was an "illegal" act. *Id.* at 1390. In considering the tenant's claim, the court reviewed the *POSSE* decision and found that the amendment did not unconstitutionally deprive the owner of a vested contractual right as the provision allowing prepayment was " 'simply part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.'" *Id.* at 1396-97.

Thus in *Orrego*, as in *POSSE*, the owner did not have a protected property interest because the "rights" it asserted were solely government-created. The "contract" the owner entered into was a standard agreement which existed pursuant to an established regulatory scheme. The purported contract, unlike the one at issue here, was not the result of arms-length negotiation and an exchange of legally binding consideration. The correct analogy to the instant case would be if in *Orrego* the owner had been encouraged by the government to pay off its mortgage and the government had then prohibited it from renting half its apartments!

In addition to the absence of the element of bargaining, there was also no agreement in *POSSE*

between the government and the plaintiffs, implied or otherwise, to exchange real obligations for real benefits. The provision at issue in POSSE permitted voluntary participation of states and state agencies in the social security system. Although the states and their employees paid social security taxes, these were paid in exchange for the right to receive benefits, not in exchange for the ability of the states to withdraw from the system. The California employees paid the same taxes for the same benefits as did all other participants in the social security system. Further, it should be remembered that social security payments are taxes, not insurance premiums voluntarily paid. *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937). States thus received a benefit (an opportunity to provide retirement benefits for their citizens) without having to incur a corresponding binding obligation. Any purported contractual relationship existing between the government and the POSSE plaintiffs was therefore invalid for lack of consideration. *See Brannan v. United States*, 7 Cl.Ct. 399, 405 (1985) ("[I]t is basic that consideration is an essential element of any valid contract, whether express or implied in fact."); *see also Lynch*, 292 U.S. at 576, 54 S.Ct. at 842 (finding insurance policies issued by the government to the plaintiffs binding contracts on the basis that the plaintiffs paid consideration, *i.e.* prescribed monthly premiums, to the government); *Estate of Samuel E. Bogley*, 514 F.2d 1027, 206 Ct.Cl. at 704-05 (" '[T]he ingredients of a contract are parties, consent, consideration, and obligation.' ") (quoting *Farrington*

v. Tennessee, 95 U.S. (5 Otto) 679, 24 L.Ed. 558 (1877)).[10]

In contrast, a contractual relationship, with all its attendant obligations and duties, existed between the government and the *Winstar* plaintiffs. All the basic elements of contract formation were present: capacity and mutual intent to contract, arms length negotiation, and the exchange of real obligations for real benefits. *See Winstar*, 21 Cl.Ct. at 114-17.[11] The

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[10] The Court would also not have found a contractual relationship existing between the government and the state and local employee plaintiffs as participation by employees of entities enrolled in the social security system was effectively mandatory. *See POSSE*, 477 U.S. at 41 n. 11, 106 S.Ct. at 2394 n. 11. An essential element in the formation of a contract, free will of all the parties, was therefore absent as the employee plaintiffs did not willingly negotiate their participation in the system. A decision to invest in or purchase a failing savings and loan has never been made mandatory to this court's knowledge, and was not so here.

[11] The court is not alone in reaching this conclusion. *See, e.g., Far West Fed. Bank v. Director, Office of Thrift Supervision*, 787 F.Supp. 952 (D.Or.1992); *Charter Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 773 F.Supp. 809, 821 (W.D.Va.1991) ("[T]he FHLBB had the discretion to allow or disallow the use of supervisory goodwill over the stipulated time for amortization. The inducement to allow it came, not from the mandate of a regulation, but the FHLBB's need for assistance from plaintiff's institution. This was consideration, and it is one of the essential elements in the parties' legal relationship which characterizes it as contractual in nature."); *Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 762 F.Supp. 1159 (D.N.J.1991); *Hansen Sav. Bank v. Office of Thrift Supervision*, 758 F.Supp. 240 (D.N.J.1991); *Security Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 761 F.Supp. 1277 (S.D.Miss.1991); *Far West Fed. Bank v. Director, Office of Thrift Supervision*, 746 F.Supp. 1042 (D.Or.1990); *Security Fed. Sav. Bank v. Director, Office of Thrift Super-*

court's conclusion is buttressed by the fact that the terms of the separate agreements negotiated between each acquiring savings and loan and the FHLBB and FSLIC substantially differ. This is in contrast with the standard agreements at issue in *POSSE* and *Orrego*, where the entities "contracting" with the government had no choice but to accept the terms of a pre-existing regulatory agreement. The fact that the government was a party to this contract, then, has no

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vision, 747 F.Supp. 656 (N.D.Fla.1990); *Sterling Sav. Ass'n v. Ryan*, 751 F.Supp. 871 (E.D.Wash.1990); *see also Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1345 (6th Cir.1991) (Contie, J. dissenting) ("The bargained-for (*quid pro quo*) forbearance clearly constitutes an integral component of the negotiated agreement between the FHLBB and [plaintiffs] and was not, as the government suggests, merely a gratuitous forbearance. [Plaintiffs'] shareholders bargained for the instant forbearance and provided the government valuable consideration in reliance upon the government's promise to allow [plaintiffs] the right to amortize supervisory goodwill over a 25-year period."). Authority to the contrary is not definitive on the contract issue. *See Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1341 (6th Cir.1991) (reversing a district court's granting of a preliminary injunction enjoining the Office of Thrift Supervision from excluding supervisory goodwill, but not deciding whether a binding contract existed between the acquiring savings and loan and the government); *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir.1991) (same); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, No. 90-1678, 1991 WL 201178 at *7, 1991 U.S.Dist.Col. LEXIS 11877 at *19-20 (denying the grant of a preliminary injunction, but not deciding whether the parties' relationship constituted "a contract or some less binding form of agreement"); *Flagship Fed. Sav. Bank v. Wall*, 748 F.Supp. 742 (S.D.Cal.1990) (denying injunctive relief, but not reaching the contract issue).

bearing on its binding effect. *See Sinking-Fund Cases*, 99 U.S. (9 Otto) 700, 719, 25 L.Ed. 496, 504 (1878) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.").

Approximately forty percent of this court's cases are contract claims involving the federal government. While the government may engage in extremely large and important contractual relationships, it would make all dealings with the government a very elaborate and expensive form of gambling to hold that the government may repudiate a contract whenever subsequent policy considerations dictate that it was not a good or prudent bargain. As James Madison noted exactly two hundred years ago: "Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*." JAMES MADISON, *Property* (1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101, 102 (Gaillard Hunt ed., 1906) (emphasis in original).

In finding the existence of a contract in this case the court agrees with the government's assertion, and follows the Supreme Court's holding in *POSSE*, that Congress is free, absent an express and unmistakable intention to the contrary, to enact legislation contravening the terms of prior contractual agree-

ments.[12] Rather, the point the court made in its July 27, 1990 opinion was that when Congress elects to so legislate, the government must still honor the rights of its citizens. *See Winstar*, 21 Cl.Ct. at 116 ("[W]hile Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit."). As discussed more fully below, Congress' decision to regulate in this case had the consequence of exposing the government to potential liability for breach of contract damages or the possibility of having to make restitution to plaintiffs. The assertion that, in order to freely regulate, the government must have the power to disregard the rights and interests of its citizens is a novel proposition that finds no support in the legislative history of FIRREA, or for that matter, in our constitutional tradition. Sovereign power is always restricted, in one sense, by the rights of individuals. However, in our Nation that has never been seen as an improper restriction on regulatory power. Rather, it is the foundation upon which all law and regulation are built. *See Hendler v. United States*, 952 F.2d 1364, 1374 (Fed.Cir.1991) ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.") (emphasis in original).

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[12] This principle was recently reaffirmed in *Peterson v. United States Department of Interior*, 899 F.2d 799 (9th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 567, 112 L.Ed.2d 574 (1990), a case also relied upon by defendant in its Motion for Clarification.

Although *POSSE* and well-developed case law makes it clear that the government is at all times free to legislate, that freedom is inherently constrained by the government's obligation to honor its prior contractual commitments, especially when the government has received a benefit. *See, e.g., Perry*, 294 U.S. at 353-54, 55 S.Ct. at 436 ("The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government . . . . Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations."). The limits imposed on the government's sovereign power in this case are analogous to the limits imposed on that power by the fifth amendment. Under well-established fifth amendment jurisprudence, the government may legislate in a way that effects, intentionally or otherwise, a "taking" of an individual's private property, whether it be by physically occupying it or rendering it valueless. The fifth amendment, however, circumscribes that governmental power by requiring that the government pay individuals "just compensation" for actions infringing on their protected property interests. *See Hendler*, 952 F.2d at 1378 ("We emphasize that the issue is *not* whether the Government had the right to impose itself and its activities on these plaintiffs. Whatever right the plaintiffs had to be let alone was overcome by the Government's need in the interest of public health and safety . . . . The issue before the court . . . [is] whether, on the facts before it, the Government took any property by permanent physical occupation, thus obligating it to pay plaintiffs just compensation.") (emphasis in original). Thus, the

fifth amendment limits the government's power to take property without precluding its exercise.

In this case, the government's power to regulate must operate within the context of plaintiffs' contract rights. While Congress clearly may alter the regulatory treatment of supervisory goodwill, it must also honor the plaintiffs' rights. The government may breach the contract, but it must pay for the damages the plaintiffs suffer. Any alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights.

II. Exemption from future legislation by Congress

In its Motion for Clarification, the government asserts that in order to find the existence of a binding contract right, for which damages can be given, the court must first find that the FHLBB or FSLIC had the authority to grant plaintiffs an unequivocal right to be exempt from future legislation governing the capital treatment of supervisory goodwill. Although the court finds that plaintiffs were *not* granted an exemption from future regulation concerning supervisory goodwill, the court holds that this exemption question is not relevant to the issues before the court. As the court noted in its July 27, 1990 opinion, "plaintiffs are not claiming that the government contractually bound Congress not to change its regulations." *Winstar*, 21 Cl.Ct. at 116. Rather, plaintiffs seek recovery for alleged injuries resulting from Congress' decision to abrogate the government's agreement with plaintiffs. Thus, plaintiffs' claim does not hinge on whether the government granted, or possessed the authority to grant, plaintiffs an

exemption, implied or explicit, from subsequent regulation.

III. Breach of contract

Turning to the question of contract breach, the court finds that in enacting FIRREA the government did in fact breach its contract with plaintiffs. It is undisputed that the original agreement between the parties allowed plaintiffs to treat supervisory goodwill as a capital asset and to amortize it over thirty-five years. It is also undisputed that the government, in enacting FIRREA, altered existing regulations both to reduce the amount of supervisory goodwill includable in calculating core capital and to permit supervisory goodwill to be amortized for no more than twenty years.[12] The effect of FIRREA on plaintiffs was to exclude all but $2.7 million of approximately $9.1 million of supervisory goodwill includable before the enactment of the statute. The court holds that FIRREA's alteration of the terms of the original agreement, absent a countervailing contractual right to do so, constituted a breach of contract entitling plaintiffs to damages or restitution. The government has cited no contractually-based right to alter the terms of the original contract.

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[12] FIRREA mandates the phasing out of the use of supervisory goodwill in calculating core capital. Prior to January 1, 1992, the amount of supervisory goodwill includable in core capital cannot exceed 1.5% of total assets. Thereafter, the amount of supervisory goodwill includable in core capital declines each year, so as not to exceed 1.0% of total assets through December 31, 1992; not to exceed 0.75% of total assets through December 31, 1993; and not to exceed 0.375% of total assets through December 31, 1994. 12 U.S.C. § 1464(t)(3)(A).

In finding that the government breached its contract with plaintiffs, the court seeks to make it clear that its decision does not reflect, as the government suggests it would, a judgment by the court upon the Congress' savings and loan policy. Clearly, this court is not a policy-making body. The duty of this court, like any other court, is solely limited to determining the respective rights of the particular parties before it and granting relief to the parties where appropriate. It would be highly improper for this court to consider, as the government seems to suggest it do, the effect of this decision on the government's savings and loan policy. Courts are not established to make policy. Our Constitution, and the people who established that great document, gave the policy-making powers to the executive and legislative branches. In a constitutional democracy such as this one, the court must accept as given policies duly enacted into law such as FIRREA was. Likewise, the courts, when adjudicating the rights of citizens, must not be influenced by the amount at stake, whether it be one cent or one billion dollars. It is as wrong to award one cent that is not merited as it is to fail to award a billion dollars that is justly due. To do otherwise would make a mockery of equal justice under law. In establishing this court, Congress gave it a simple mandate: to hear certain monetary claims brought against the government; to determine the government's liability pursuant to those claims, if any; and to fix the amount of damages owed to particular plaintiffs. See 28 U.S.C. § 1491 (1982); S.REP. No. 96-304, 96th Cong., 1st Sess. 11 (1979).

IV. Sovereign acts doctrine

In its Motion for Clarification, the government also argues that the sovereign acts doctrine precludes plaintiffs' recovery for breach of contract.[14] Under that doctrine, the government is not contractually liable, absent an express agreement to the contrary, for the consequences of acts performed in its sovereign capacity. *See generally* Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U.TOL.L.REV. 29 (1975). In *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925), the Supreme Court articulated the doctrine as follows:

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming v. United States*, 1 Ct.Cls. 190, 191; *Jones v. United States*, 1 Ct.Cls. 383, 384; *Wilson v. United States*, 11 Ct.Cls. 513, 520. In the *Jones Case*, *supra*, the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular

[14] The government also asserts this doctrine as a defense to plaintiffs' taking claim.

> contracts into which it enters with private persons . . . ."

(quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)).

Although the sovereign acts doctrine grants the government immunity from liability on a variety of contractual theories, the doctrine "is not a boundless justification for governmental non-liability." Latham *supra* at 41; *see also American Satellite Co. v. United States*, 20 Cl.Ct. 710, 715 (1990) ("Mere invocation of the sovereign acts doctrine is not a talisman. The doctrine has limitations."). The doctrine grants the government immunity only where the government action alleged to constitute a breach is "public and general" in nature. Typically, government acts have been considered "public and general" when they impose a broad and general effect upon the society or the economy. *See, e.g., Horowitz*, 267 U.S. at 461, 45 S.Ct. at 344 (government found immune from liability where plaintiff's loss was caused by shipping embargo imposed by government on all shipments of silk); *Tony Downs Foods Co. v. United States*, 530 F.2d 367, 209 Ct.Cl. 31, 34 (1976) (immunity found where Executive Order lifting price freeze "on all commodities and services" caused monetary loss to plaintiff); *Amino Bros. Co. v. United States*, 372 F.2d 485, 178 Ct.Cl. 515, 525, *cert. denied*, 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) (immunity found where government's opening of dam flood gates to run-off water from heavy rains "affected the public generally and was not directed solely toward the plaintiff"); *J.B. McCrary Co. v. United States*, 84 F.Supp. 368, 114 Ct.Cl. 12, 34 (1949) (immunity found where Executive Order freezing labor wages

determined to be "an order of general application affecting all contractors and businesses and laborers everywhere"); *Gothwaite v. United States*, 102 Ct.Cl. 400, 401 (1944) (immunity found where regulations of War Production Board impeding plaintiff's performance affected all entities requiring materials needed for the war effort).[15]

Conversely, where the government abrogates through a limited and focused action specific government obligations to a particular class of individuals or entities it has contracted with, the government is not afforded immunity. In these instances, the government acts not in its capacity as sovereign, but in its capacity as contractor. *See, e.g., Everett Plywood Corp. v. United States*, 651 F.2d 723, 227 Ct.Cl. 415, 429 (1981) ("[T]he act [prohibiting plaintiff from cutting timber it had purchased from the government] was neither public nor general—the government unilaterally terminated one contract after deciding continued performance would have been unwise. It would have been an entirely different case if Congress had passed a law immediately prohibiting all cutting in all public forests, but this unilateral termination does not constitute a sovereign act that

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[15] In situations where courts have applied the sovereign acts doctrine to government actions only affecting a small class of individuals or entities, *i.e.* where the government action is not literally "general" in application, emphasis has been placed on the compelling "public" nature of the act. *See, e.g., Wah Chang Corp. v. United States*, 282 F.2d 728, 151 Ct.Cl. 41, 51 (1960) (finding that "the temporary taking" of plaintiff's property "for the purpose of facilitating and guarding the secrecy of troop movements in time of war was a 'public and general' act of sovereignty 'performed for the general good' within the meaning of the *Horowitz* doctrine.").

excuses the government from breach damages."); *Sunswick Corp. v. United States*, 75 F.Supp. 221, 109 Ct.Cl. 772, *cert. denied*, 334 U.S. 827, 68 S.Ct. 1337, 92 L.Ed. 1755 (1948) ("It does not follow that the action of the Wage Adjustment Board in directing the plaintiff to increase its carpenters' wages can be so isolated under the guise of an act of sovereignty as to permit the Government, in its capacity as a party to the contract, to disavow having had any part in such action, and to disclaim any liability for whatever increased burden this action may have added to the performance of the contract. The increased wage costs for which plaintiff seeks to be reimbursed resulted not from the Government's public and general act in setting up its wartime system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy . . . Thus, the distinction may be seen to rest on which hat the government is wearing when the action abrogating the contract is taken. Is it the government as sovereign or the government as contracting party? In this sense, the application of the doctrine has hinged on the facts of each case.

In order to invoke the sovereign acts doctrine, then, the government bears the burden of showing that its actions "were public, general, sovereign, performed for the public good, and not arbitrary and unreasonable." *American Satellite*, 20 Cl.Ct. at 715 (citing *Air Terminal Servs., Inc. v. United States*, 330 F.2d 974, 165 Ct.Cl. 525, 536 (dissenting opinion of Jones, C.J.), *cert. denied*, 379 U.S. 829, 85 S.Ct. 57, 13 L.Ed.2d 38 (1964)). In this case, the government has not made the requisite showings to invoke the doctrine. The pertinent sections of FIRREA at issue here, 12

U.S.C. §§ 1464(t)(3)(A) and (9)(B), preclude the application of the sovereign acts doctrine.[16] Their very purpose was to take away plaintiffs' rights to use supervisory goodwill because the Congress felt its use was no longer good policy. Courts assessing sovereign act claims have not granted immunity where the sole purpose of the government action is to reverse an earlier policy decision later deemed unwise. *See, e.g., Everett Plywood*, 651 F.2d 723, 227 Ct.Cl. at 429 (government's decision to cancel contract to sell standing timber due to its concern that continued logging and road construction would cause damage to soil, watershed and forest resources found not to be a sovereign act); *Sun Oil Co.*, 572 F.2d 786, 215 Ct.Cl. at 759-68 (government's decision to deny a permit and thereby breach oil drilling lease agreement with plaintiffs because of environmental concerns did not constitute a sovereign act); *Freedman v. United States*, 320 F.2d 359, 162 Ct.Cl. 390 (1963) (government's cancellation of contract to sell surplus tanks because of subsequent discovery of presence in tanks of valuable diesel engines found not to be a sovereign act); *Miller v. United States*, 140 F.Supp. 789, 135 Ct.Cl. 1 (1956) (government's cancellation of contract to sell surplus aircraft because of government's later decision that sales to plaintiff

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[16] F[illegible] *see Far West Fed. Bank v. Director, Office of Thrift Supervision*, 787 F.Supp. 952, 958-59 (D.Or.1992) (finding FIRREA to be a sovereign act, but ruling that plaintiffs' claim for rescission and restitution based on frustration of purpose is "entirely consistent with the purposes of the sovereign acts doctrine"). Thus the court notes that even if the sovereign acts doctrine did apply to these provisions of FIRREA, plaintiffs might still obtain relief on a theory of frustration of purpose.

would be contrary to national interests found not to be a sovereign act).

In the instant case, taking away plaintiffs' right in these sections of FIRREA was not the necessary means to a broad public end, rather it was the government's end goal. On the government's reasoning, *any* statute breaching a contract would be immune under the doctrine merely because its purpose was to breach the contract. This court has never granted government immunity on such a basis. *See Freedman*, 320 F.2d 359, 162 Ct.Cl. at 402 (the sovereign acts doctrine "does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused . . . . The existence of this court is proof enough that the desire to save money is a poor reason to break an outstanding promise."). Although the court accepts as a given that the government sought to promote the public welfare in enacting FIRREA as a whole, those specific provisions of the Act altering the capital treatment of supervisory goodwill were intended to, and did, impact only upon plaintiffs and those similarly situated entities who had acquired savings and loan institutions. This fact compels the conclusion that sovereign act immunity cannot adhere in this and related cases.

In analyzing the sovereign acts doctrine's applicability to the facts of this case, the court finds it significant that the public purpose the government sought to promote could have been achieved without disturbing plaintiffs' contractual rights. *See Freedman*, 320 F.2d 359, 162 Ct.Cl. at 397-98, 402; *Miller v. United States*, 140 F.Supp. 789, 135 Ct.Cl. at 10-11 (1956); *Weaver Constr. Co.*, 91-2 B.C.A. ¶ 23,800, 1990 WL 39131, 1990 DOT BCA LEXIS 12 at *13

("[T]he Government is not immune from contract damages for an act which implements national policy if the required implementation could have been achieved without disturbing contractual relationships."). The government's suggestion, therefore, that a finding by this court that the sovereign acts doctrine is not applicable would somehow defeat the objectives of Congress in passing FIRREA is without merit. Such a suggestion could only be true if it is assumed that the statute's only cure for the savings and loan industry is taking plaintiffs' newly contributed capital to pay for the alleged excesses of past generations. The statute's comprehensive reform and regulatory system give no support to this view of the role of sections 1464(t)(3)(A) and (9)(B). The question in this case is not whether heightened capital standards for savings and loans is a good policy (the court must and does accept Congress' and the President's decision that it is), rather it is the question whether sections 1464(t)(3)(A) and (9)(B) may force plaintiffs rather than the government to pay for this policy. They may not. As James Madison observed:

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

JAMES MADISON, *Property* (1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101, 103 (Gaillard Hunt ed., 1906).

CONCLUSION

For the reasons set forth above, the court finds that a binding contract existed between the government and the plaintiffs and that the government breached that contract when Congress enacted FIRREA. Accordingly, this case will move forward to determine plaintiffs' injury, if any, and the appropriate measure of damages or manner of restitution.

IT IS SO ORDERED.

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 90-8C

WINSTAR CORP., ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[FILED FEBRUARY 21, 1992]

ORDER

To the extent that the court has treated defendant's Motion for Clarification of the Issues Remaining to be Briefed Respecting the Government's Alleged Contract Breach as a motion for reconsideration, that motion is denied. To the extent that this order clarifies defendant's questions, posed in its Motion for Clarification, that motion is granted.

In the next month the court intends to more fully elaborate upon this order with an opinion. However, in order for this litigation, and other related cases to proceed efficiently towards resolution the court provides the parties with the following answers to the questions posed in defendant's Motion for Clarification.

(1) After a further consideration of *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986) (*POSSE*), and *Peterson v. Department of Interior*, 899 F.2d 799 (9th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 567, 112 L.Ed.2d 574 (1990), as well as other case law and briefing in this, and related cases, the court holds that abrogation of plaintiffs' right to treat supervisory goodwill as a capital asset for a period of 35 years breached the government's contract with plaintiffs.

(2) The opinion makes it clear that plaintiffs were not granted an exemption from legislation governing the capital treatment of goodwill. However, the plaintiffs' do have a contract right to certain treatment of their supervisory goodwill as a capital asset. Abrogation of this right by the government absent a countervailing contractual right of the government is a breach of contract entitling the plaintiffs to damages or restitution.

(3) The sovereign acts doctrine does not bar plaintiffs' claims in this or analogous cases.

This order shall be sent to all parties in all *Winstar*-related cases. A status conference in this case and all related cases shall be scheduled for the week of March 23, 1992 to discuss the orderly scheduling of all pending issues to the end that the litigation may proceed to a resolution of remaining issues.

IT IS SO ORDERED.

APPENDIX F

IN THE UNITED STATES CLAIMS COURT

No. 90-8C

WINSTAR CORPORATION & UNITED FEDERAL SAVINGS BANK, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[FILED JULY 27, 1990]

OPINION

SMITH, Chief Judge.

This dispute stems from the acquisition of a failing savings and loan prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and the subsequent effect of the new regulatory scheme on plaintiffs. It presently is before the court on plaintiffs' motion for summary judgment as to liability and defendant's motion to dismiss or in the alternative cross-motion for summary judgment. Although plaintiffs' complaint advances several legal theories, the prerequisite for recovery under any proposed rationale requires the court to find that plaintiffs had a property right stemming from contract or some other

source to include supervisory goodwill as a capital asset for regulatory purposes and to amortize it over 35 years.

After careful consideration of the arguments advanced in the parties' briefs and during extensive oral arguments, the court denies the parties' motions, with leave to renew or move for judgment on the pleadings under RUSCC 12(c), if and when appropriate. The court is of the opinion that summary judgment on liability is precluded because a genuine issue of material fact remains, and requests further briefing in order to resolve this issue.

The court further finds that although there were express agreements among the parties, the transaction as a whole is represented by an implied-in-fact contract. For reasons set forth below, the court reserves its consideration of the taking claim.

FACTS

The facts presented here are intended to provide the reader with a basic understanding of the context in which this dispute arises, and are not intended as a complete factual statement of the case.

Plaintiffs are Winstar Corporation and United Federal Savings Bank, a federal stock savings bank, all of the common stock of which is owned by Winstar. Winstar was formed in 1984 for the sole purpose of acquiring Windom Federal Savings & Loan Association. Windom had shown substantial operating losses in its 1983 year-end report. Faced with the probable need to liquidate Windom, at an alleged cost to the government of over $12 million, the Federal Home Loan Bank Board (FHLBB) actively solicited bids for its acquisition from a list of potential acquirers, among which were the organizers of

Winstar. In late 1983, FHLBB and the Federal Savings and Loan Insurance Corporation (FSLIC) began negotiating with the organizers of Windom. FSLIC eventually recommended to FHLBB that it approve Winstar's merger proposal, based on its analysis of several factors, including the cost to the government of the available alternatives. Winstar's proposal was estimated to be the least costly to the government of all the acquisition proposals, and less than half as expensive as the liquidation of Windom.

Included in Winstar's proposal was the provision that the acquisition employ the purchase method of accounting. Under this method, as described by plaintiffs and not disputed by defendant, the book value of the acquired thrift's assets and liabilities was adjusted to fair market value at the time of the acquisition. Any excess in the cost of the acquisition (which included liabilities assumed by the acquirer) over the fair market value of the acquired assets was separately recorded on the acquirer's books as "goodwill." In other words, the government agreed to allow the plaintiffs and others in similar circumstances to treat what was a deficit in capital as an asset. Goodwill was considered an intangible asset that could be amortized on a straight-line basis over a number of years. The difference between the aggregate fair market value of liabilities assumed by the acquirer and the aggregate fair market value of the failing thrift's assets was known as "supervisory goodwill," in the context of a supervisory merger, and was recorded on the resulting institution's balance sheet as an asset includable in capital for purposes of satisfying FHLBB's minimum capital requirements.

Winstar's initial proposal subsequently was modified, but at all times indicated that the purchase

method of accounting would be used. The proposal ultimately accepted by the government called for a 35-year period for the amortization of this asset. It was anticipated that after such time, at the very latest, the institution really would be in the black. It was hoped that by doing this, with some real infusions of new money and a certain number of years to eliminate this unusual asset, the savings bank could work its way out of the deficit.

In 1989, President Bush signed into law the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, 103 Stat. 183 (Aug. 9, 1989) (now codified at various sections of Title 12 of the United States Code). Among the many changes effected by the act are extensive amendments to the Home Owner's Loan Act, codified at 12 U.S.C. §§ 1461-1468, significantly affecting the regulation of the savings and loan industry. The most important provisions for purposes of this case relate to the permissible regulatory treatment of supervisory goodwill.

Under the new law, a certain amount of supervisory goodwill is permitted to be amortized for no more than 20 years. The law restricts on a declining basis the percentage of that goodwill that may be included as capital. The statutory mechanism for this is found in the transition rule that applies to capital standards, at 12 U.S.C. § 1464(t)(3)(A). That section reads as follows:

> Notwithstanding paragraph (9)(A) [defining core capital generally to exclude intangible assets], an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table . . . .

The table indicates that from the date of enactment through December 31, 1994, the percentages decline from 1.500% to 0.375%, after which time no amount will be includable.

"Qualifying supervisory goodwill" is a defined term, the definition of which is found at 12 U.S.C. § 1464(t)(9)(B).

> The term "qualifying supervisory goodwill" means supervisory goodwill existing on April 12, 1989, amortized on a straight-line basis over the shorter of—
>
> (i) 20 years, or
>
> (ii) the remaining period for amortization in effect on April 12, 1989.

Plaintiffs allege that the exclusion under FIRREA of at least some of plaintiffs' supervisory goodwill is in violation of the parties' agreement, and constitutes a breach of contract and, in the alternative, a taking of plaintiffs' contract rights. It also is alleged that as a result of this section, plaintiffs have suffered severe losses.

DISCUSSION

The immediate issue before the court is a garden variety question of whether a contract, express or implied, existed. Although there certainly were express representations made, they combined to create a transaction, which, as a whole, is represented by a contract implied-in-fact.

There is a significant amount of precedent involving the elements required to show an implied-in-fact contract in this court. It has been stated that:

> A contract implied in fact requires a showing of the same intent to contract as that required for an express contract .... It is essential ... that the acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain. The requirements of mutuality of intent and the lack of ambiguity in offer and acceptance are the same for an implied-in-fact contract as for an express contract; only the nature of the evidence differs.

Russell Corp. v. United States, 537 F.2d 474, 210 Ct.Cl. 596, 609 (1976), *cert. denied*, 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977) (footnotes omitted). *See also Somali Dev. Bank v. United States*, 508 F.2d 817, 205 Ct.Cl. 741, 751 (1974) ("Before a contract may be implied in fact, there must be a meeting of the minds which is inferred from the conduct of the parties, and in the light of the surrounding circumstances, shows their tacit understanding."). Of course, mutual assent is not sufficient to imply a contract. "[T]here must be some consideration moving to the United States, or the Government must have received money under a duty to pay it over, or the claimant must have had a lawful right to the money when it was received, such as money paid under a mistake." *Id.* 508 F.2d 817, 205 Ct.Cl. at 751 (citing *Knote v. United States*, 95 U.S. 149, 156, 24 L.Ed. 442 (1877)).

Defendant vigorously claims that neither FSLIC nor FHLBB agreed that there would be no changes in

regulatory policy with respect to goodwill, nor could they so bind Congress. Plaintiffs assert, with equal vigor, that the government expressed an unequivocal agreement that plaintiffs would be permitted to continue to treat supervisory goodwill as a capital asset and to amortize it for 35 years, regardless of changes in generally accepted accounting principles (GAAP) or in regulatory policy.

The undisputed evidence confirms plaintiffs' position. Among the relevant documents evidencing the parties' intent is the correspondence from the FHLBB to the Board of Directors of United dated July 13, 1984, and referred to in this litigation as the forbearance letter. The first paragraph of the letter indicates that its purpose is "to confirm the understanding that:," and continues to enumerate several terms of the acquisition. Paragraph 2 reads as follows:

> For purposes of reporting to the Board, the value of any intangible assets resulting from accounting for the merger in accordance with the purchase method may be amortized by Savings Bank over a period not to exceed 35 years by the straight-line method; ....

The letter also indicated that the FHLBB recognized that the accounting practices mentioned may have deviated from GAAP: "The accounting forbearances ... are not acceptable in any financial statements which are required to be prepared in accordance with generally accepted accounting principles."

Further evidence of defendant's intent is found in two inter-office memoranda from financial analysts at FHLBB, both of whom were reporting on viability analyses regarding the proposed acquisition. The

first memo, dated March 14, 1984, listed among its "Relevant Assumptions" the following:

> 2. Purchase accounting is applied to the assets of Windom . . . . Goodwill is amortized over 40 years.

The second memo, dated May 30, 1984, similarly listed among its "Relevant Assumptions" that "[g]oodwill is amortized over 35 years." Based on these assumptions, the FHLBB estimated the amount of financial assistance to be provided by FSLIC and the acquirers, respectively. An additional inter-office memorandum from the Deputy Director of Program/Administration of the FHLBB to the Assistant Director of the agency, dated June 1, 1984, indicated the appropriateness of the purchase method of accounting for the proposed transaction, as well as the office's "lack of objection to the accounting forbearance outlined for purposes of reports to the FHLBB."

The documents discussed above are representative of the evidence that leads this court to the firm conclusion that the government expressly intended to contract for the particular treatment of goodwill at issue in this case, notwithstanding changes in GAAP or in the statutory scheme. There is no support for the defendant's argument that these statements merely were representations of the then-existing regulatory policy. Rather, they illustrate the reality that the promise of continued treatment of goodwill as a capital asset that could be amortized over 35 years was a negotiated and critical term of this particular transaction. It was critical because it was clear that without it no purchaser would have engaged in this transaction.

Defendant attempts to mischaracterize plaintiffs' claim as one which improperly seeks to bind the government's power to regulate. To support its motion to dismiss on this ground, defendant cites *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 106 S.Ct. 2390, 2396-97, 91 L.Ed.2d 35 (1986) (*POSSE*) ("contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign" (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982))); *St. Louis v. United Railways Co.*, 210 U.S. 266, 273-75, 280, 28 S.Ct. 630, 634, 52 L.Ed. 1054 (1908) (sovereign power to tax retained unless "specifically surrendered in terms which admit of no other reasonable interpretation"); *Vicksburg, Shreveport & Pacific Rail Road Co. v. Dennis*, 116 U.S. 665, 668, 6 S.Ct. 625, 626-27, 29 L.Ed. 770 (1886) (" 'neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken' "); and *Peterson v. United States Department of Interior*, 899 F.2d 799 (9th Cir.1990) (rejecting claim by water management districts that they had contractual right to continue delivering subsidized water to leaseholds of any size notwithstanding change in statute limiting size of leaseholds to which the water could be delivered). All of these cases, however, recognize that there are contracts to which the government must be bound, particularly when the government has received a benefit. *E.g.*, *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2396-97 (citing *Perry v. United States*, 294 U.S. 330, 350-54, 55 S.Ct. 432, 434-37, 79 L.Ed. 912 (1935)); *Lynch v. United States*,

292 U.S. 571, 586, 54 S.Ct. 840, 846-47, 78 L.Ed. 1434 (1934).

It is critical to this case, and apparently misconstrued by defendant, that plaintiffs are not claiming that the government contractually bound Congress not to change its regulations. Rather, plaintiffs claim that in their particular transaction with the government, it was agreed that they would be permitted to treat supervisory goodwill in a particular way for a fixed number of years. Thus, while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit. An analogy may be drawn to the corporate world, in which under state law and a corporation's by-laws its board of directors' ability to act for the good of the shareholders may not be limited. Notwithstanding this prohibition, the corporation may be required to pay for its actions, such as firing an officer, although the legitimacy of its action is not questioned. With respect to government actions, an analogous situation may be found in the area of regulatory takings. Although Congress may exercise its police power and regulate extensively, in some cases when it does so it must provide just compensation if the result of the regulation effectively is to condemn a property right. *See, e.g., First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 145, 98 S.Ct. 2646, 2669-70, 57 L.Ed.2d 631 (1978) (Rehnquist, C.J., dissenting). The fact that the

government was free to change its regulatory scheme is not inconsistent with the possibility that there exists a contract here under which the government may have obligations to the plaintiffs in this case.

Finally, defendant argues that in determining whether there exists a contract the court is required to interpret the transaction in light of the policies underlying the controlling legislation. *See Peterson*, 899 F.2d at 807 (relying on *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 87-88, 79 S.Ct. 141, 144, 3 L.Ed.2d 132 (1958)). Accepting this proposition, the court is convinced that at least part of the policy reflected in the prior and current regulatory schemes is a strong desire, if not need, on the part of the government to involve the private sector in rescuing failing savings and loans. This view, coupled with the fact that no other private entity would have entered into an agreement to purchase Windom without an agreement to allow it to continue to treat supervisory goodwill as a capital asset and to amortize it over 35 years (or a comparable alternative to achieve the same result), buttresses plaintiffs' assertions.

In the instant case, there is ample evidence to support the court's finding that a contract implied-in-fact was formed between the organizers of Winstar and the United States. This contract embraced the entire transaction by which Windom was acquired by Winstar and merged into United. This contract includes the various written agreements among all interested parties. Among the critical terms of this contract were the obligations on the part of the government to put approximately $1.95 million directly into United and to contribute an additional several million dollars based on Windom's aggregate negative net worth, a sum that ultimately amounted

to $3,694,499, for a total cash contribution of $5,644,499. Winstar, in turn, was obligated to immediately put $2 million into United. As an additional and critical term of the contract, the government agreed to permit Winstar to treat supervisory goodwill as a capital asset to be amortized over 35 years. It must be stressed that the contract provided that this particular institution would be permitted to continue the treatment of supervisory goodwill as a capital asset that could be amortized over 35 years, and not that the regulations would not change. In consideration, the government received the benefit of relief from its obligations to liquidate Windom or otherwise provide for the depositors of Windom, the value of which, while certainly substantial, remains to be determined.

> The court also finds, contrary to defendant's contention, that this contract is not governed by the Contract Disputes Act because it is not a contract for "the procurement of property, . . . ; services; . . . construction, alterations, repair or maintenance of real property; or, . . . the disposal of personal property." 41 U.S.C. § 602(a) (1988).

Because it is preferable to resolve disputes in such a way as to avoid constitutional considerations, *see, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, 99 S.Ct. 1355, 1364, 59 L.Ed.2d 587 (1978); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944), and because the resolution of plaintiffs' contract claim may obviate the need to proceed on the taking claim, further consideration of plaintiffs' taking claim is suspended.

CONCLUSION

Defendant's argument that the government could not have been a party to the acquisition because the government never owned Windom belies the actual nature of the relationships among the parties, and the character of the transaction. Far from solely providing the necessary regulatory approval for the acquisition, the government was a necessary party to the occurrence of this transaction. It was a party to the implied-in-fact contract, obligating itself and accepting consideration from plaintiffs.

The court requires further briefing on several elements of plaintiffs' contract claim which are necessary to determine liability, and requests further briefing on: whether a breach occurred; if so, whether it resulted in injury; if so, the type and measure of relief appropriate. A status conference to establish a briefing schedule will be scheduled by subsequent order.

APPENDIX G

STATUTORY PROVISIONS AND REGULATIONS

1. Section 1464(t) of Title 12, U.S.C., provides, in relevant part:

(t) Capital standards

(1) In general

(A) Requirement for standards to be prescribed

The Director shall, by regulation, prescribe and maintain uniformly applicable capital standards for savings associations. Those standards shall include —

(i) a leverage limit;

(ii) a tangible capital requirement; and

(iii) a risk-based capital requirement.

(B) Compliance

A savings association is not in compliance with capital standards for purposes of this subsection unless it complies with all capital standards prescribed under this paragraph.

(C) Stringency

The standards prescribed under this paragraph shall be no less stringent than the

capital standards applicable to national banks.

(D) Deadline for regulations

The Director shall promulgate final regulations under this paragraph not later than 90 days after August 9, 1989, and those regulations shall become effective not later than 120 days after August 9, 1989.

(2) Content of standards

(A) Leverage limit

The leverage limit prescribed under paragraph (1) shall require a savings association to maintain core capital in an amount not less than 3 percent of the savings association's total assets.

(B) Tangible capital requirement

The tangible capital requirement prescribed under paragraph (1) shall require a savings association to maintain tangible capital in an amount not less than 1.5 percent of the savings association's total assets.

(C) Risk-based capital requirement

Notwithstanding paragraph (1)(C), the risk-based capital requirement prescribed under paragraph (1) may deviate from the risk-based capital standards applicable to national banks to reflect interest-rate risk or other risks, but such deviations shall not, in the aggregate, result in materially lower

levels of capital being required of savings associations under the risk-based capital requirement than would be required under the risk-based capital standards applicable to national banks.

(3) Transition rule

(A) Certain qualifying supervisory goodwill included in calculating core capital

Notwithstanding paragraph (9)(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:

For the following period:	The applicable percentage is:
Prior to January 1, 1992	1.500 percent
January 1, 1992-December 31, 1992	1.000 percent
January 1, 1993-December 31, 1993	0.750 percent
January 1, 1994-December 31, 1994	0.375 percent
Thereafter	0 percent

(B) Eligible savings associations

For purposes of subparagraph (A), a savings association is an eligible savings

association so long as the Director determines that —

(i) the savings association's management is competent;

(ii) the savings association is in substantial compliance with all applicable statutes, regulations, orders, and supervisory agreements and directives; and

(iii) the savings association's management has not engaged in insider dealing, speculative practices, or any other activities that have jeopardized the association's safety and soundness or contributed to impairing the association's capital.

* * * * *

(6) Consequences of failing to comply with capital standards

(A) Prior to January 1, 1991

Prior to January 1, 1991, the Director—

(i) may restrict the asset growth of any savings association not in compliance with capital standards; and

(ii) shall, beginning 60 days following the promulgation of final regulations under this subsection, require any savings association not in compliance with

capital standards to submit a plan under subsection (s)(4)(A) of this section that—

(I) addresses the savings association's need for increased capital;

(II) describes the manner in which the savings association will increase its capital so as to achieve compliance with capital standards;

(III) specifies the types and levels of activities in which the savings association will engage;

(IV) requires any increase in assets to be accompanied by an increase in tangible capital not less in percentage amount than the leverage limit then applicable;

(V) requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and

(VI) is acceptable to the Director.

(B) On or after January 1, 1991

On or after January 1, 1991, the Director—

(i) shall prohibit any asset growth by any savings association not in compliance with capital standards, except as provided in subparagraph (C); and

(ii) shall require any savings association not in compliance with capital standards to comply with a capital directive issued by the Director (which may include such restrictions, including restrictions on the payment of dividends and on compensation, as the Director determines to be appropriate).

(C) Limited growth exception

The Director may permit any savings association that is subject to subparagraph (B) to increase its assets in an amount not exceeding the amount of net interest credited to the savings association's deposit liabilities if—

(i) the savings association obtains the Director's prior approval;

(ii) any increase in assets is accompanied by an increase in tangible capital in an amount not less than 6 percent of the increase in assets (or, in the Director's discretion if the leverage limit then applicable is less than 6 percent, in an amount equal to the increase in assets multiplied by the percentage amount of the leverage limit);

(iii) any increase in assets is accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable;

(iv) any increase in assets is invested in low-risk assets, such as first mortgage loans secured by 1- to 4-family residences and fully secured consumer loans; and

(v) the savings association's ratio of core capital to total assets is not less than the ratio existing on January 1, 1991.

(D) Additional restrictions in case of excessive risks or rates

The Director may restrict the asset growth of any savings association that the Director determines is taking excessive risks or paying excessive rates for deposits.

(E) Failure to comply with plan, regulation, or order

The Director shall treat as an unsafe and unsound practice any material failure by a savings association to comply with any plan, regulation, or order under this paragraph.

(F) Effect on other regulatory authority

This paragraph does not limit any authority of the Director under other provisions of law.

* * * * *

(9) Definitions

For purposes of this subsection—

(A) Core capital

Unless the Director prescribes a more stringent definition, the term "core capital" means core capital as defined by the Comptroller of the Currency for national banks, less any unidentifiable intangible assets, plus any purchased mortgage servicing rights excluded from the Comptroller's definition of capital but included in calculating the core capital of savings associations pursuant to paragraph (4).

(B) Qualifying supervisory goodwill

The term "qualifying supervisory goodwill" means supervisory goodwill existing on April 12, 1989, amortized on a straightline basis over the shorter of—

(i) 20 years, or

(ii) the remaining period for amortization in effect on April 12, 1989.

(C) Tangible capital

The term "tangible capital" means core capital minus any intangible assets (as intangible assets are defined by the Comptroller of the Currency for national banks).

(D) Total assets

The term "total assets" means total assets (as total assets are defined by the Comptroller of the Currency for national banks) adjusted in the same manner as total assets would be adjusted in determining compliance with the leverage limit applicable to national banks if the savings association were a national bank.

(10) Use of comptroller's definitions

(A) In general

The standards prescribed under paragraph (1) shall include all relevant substantive definitions established by the Comptroller of the Currency for national banks.

(B) Special rule

If the Comptroller of the Currency has not made effective regulations defining core capital or establishing a risk-based capital standard, the Director shall use the definition and standard contained in the Comptroller's most recently published final regulations.

2. Section 567.2 of Title 12 of the Code of Federal Regulations provides:

§ 567.2 **Minimum regulatory capital requirement.**

(a) To meet its regulatory capital requirement a savings association must satisfy each of the following capital standards:

(1) *Risk-based capital requirements.* (i) A savings association's minimum risk-based capital requirement shall be an amount equal to 8% of its risk-weighted assets as measured pursuant to § 567.6(a) of this part.

(ii) A savings association may not use supplementary capital to satisfy this requirement in an amount greater than 100% of its core capital as defined in § 567.5 of this part.

(2) *Leverage ratio requirement.* (i) A savings association's minimum leverage ratio requirement shall be the amount set forth in § 567.8 of this part.

(ii) A savings association must satisfy this requirement with core capital as defined in § 567.5 of this part in an amount not less than 3% of its adjusted total assets.

(3) *Tangible capital requirement.* (i) A savings association's minimum tangible capital requirement shall be the amount set forth in § 567.9 of this part.

(ii) A savings association must satisfy this requirement with tangible capital as defined in § 567.9 of this part in an amount not less than 1.5% of its adjusted total assets.

(b) *Transition period for risk-based capital requirement.* (1) From December 7, 1989 to December 30, 1990, a savings association's minimum risk-based capital requirement for any calendar quarter shall be an amount equal to 80% of the

amount required under paragraph (a)(1) of this section; and

(2) From December 31, 1990 until December 30, 1992, a savings association's minimum risk-based capital requirement for any calendar quarter shall be an amount equal to 90% of the amount required under paragraph (a)(1) of this section.

(c) Savings associations are expected to maintain compliance with all of these standards at all times.

3. Section 567.5 of Tile 12 of the Code of Federal Regulations provides in pertinent part:

§ 567.5 **Components of capital.**

(a) *Core Capital.* (1) The following elements,[1] less the amount of any deductions pursuant to paragraph (a)(2) of this section, comprise a savings association's core capital:

(i) Common stockholders' equity (including retained earnings);

[1] Stock issues where the dividend is reset periodically based on current market conditions and the savings association's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to supplementary capital, regardless of cumulative or noncumulative characteristics.

(ii) Noncumulative perpetual preferred stock and related surplus;[2]

(iii) Minority interests in the equity accounts of subsidiaries that are fully consolidated;

(iv) Nonwithdrawable accounts and pledged deposits of mutual savings associations (excluding any treasury shares held by the savings association) meeting the criteria of regulations and memoranda of the Office to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods;

(v) The remaining goodwill (FSLIC Capital Contributions) resulting from prior regulatory accounting practices as provided in § 567.1(w)(1) of this part.

(2) *Deductions from core capital:* (i) Intangible assets are deducted from assets for purposes of determining core capital except as provided in paragraph (a)(2)(ii) of this section and § 567.12 of this part.

[2] Stock issued by subsidiaries that may not be counted by the parent savings association on the Thrift Financial Report, likewise shall not be considered in calculating capital. For example, preferred stock issued by a savings association or a subsidiary that is, in effect, collateralized by assets of the savings association or one of its subsidiaries shall not be included in capital. Similarly, common stock with mandatorily redeemable provisions is not includable in core capital.

(ii) Paragraph (a)(2)(i) of this section does not apply to qualifying supervisory goodwill held by an eligible savings association (as defined in s 567.1(h) of this part) to the extent permitted by this paragraph. The amount of qualifying supervisory goodwill may not exceed the applicable percentage of adjusted total assets as calculated for the tangible capital requirement set forth in the following table:

	Percent
Jan. 1, 1993—Dec. 31, 1993	0.750
Jan. 1, 1994—Dec. 31, 1994	0.375
Thereafter	0

(iii) [Reserved]

(iv) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the savings association has a minority ownership interest) are deducted from assets and, thus core capital except as provided in paragraphs (a)(v) and (a)(vi) of this section.

(v)(A) If a savings association has any investments (both debt and equity) in one or more subsidiaries engaged as of April 12, 1989 and continuing to be engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, core capital in accordance with paragraph

(a)(2)(v) of this section. The savings association must first deduct from assets and, thus, core capital the amount by which any investments in such subsidiary(ies) exceed the amount of such investments held by the savings association as of April 12, 1989. Next, the savings association must deduct from assets and, thus, core capital the applicable percentage set forth in paragraph (a)(2)(v)(B) of this section of the lesser of:

(1) The savings association's investments in and extensions of credit to the subsidiary as of April 12, 1989; or

(2) The savings association's investments in and extensions of credit to the subsidiary on the date as of which the savings association's capital is being determined.

(B) For purposes of paragraph (a)(2)(v)(A) of this section, the applicable percentage is as follows:

For the period:	The applicable percentage is:
Prior to July 1, 1990	
July 1, 1990-June 30, 1991	10
July 1, 1991-June 30, 1992	25
July 1, 1992-June 30, 1993	40
July 1, 1993-June 30, 1994	60
Thereafter	100

(C) A savings association that has deducted a portion of its investment in a subsidiary pursuant to paragraph (a)(2)(v)(A) of this section must consolidate the prorated assets of the subsidiary in calculating adjusted total assets for the core capital requirement by multiplying those prorated assets by the following applicable percentage and adding that amount in calculating its adjusted total assets:

For the period:	The applicable percentage is:
Prior to July 1, 1990	100
July 1, 1990-June 30, 1991	90
July 1, 1991-June 30, 1992	75
July 1, 1992-June 30, 1993	60
July 1, 1993-June 30, 1994	40
Thereafter	0

(vi) If a savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution, the Office may, in its sole discretion upon determining that the amount of core capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent savings association than the amount that would be required if the parent savings association's investment were deducted pursuant to paragraphs (a)(2)(iv) and (a)(2)(v) of this section,

consolidate the assets and liabilities of that subsidiary with those of the parent savings association in calculating the capital adequacy of the parent savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in s 567.1(l) of this part.

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